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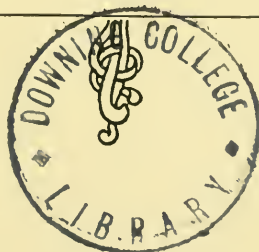
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where the right of withdrawal is also reserved in the Memorandum, they are only alterable with the consent of the Court. - *Sabbury v Watson*.  
 A company is liable for the wrongs of its agent, if committed in its service and for its benefit, to the same extent as though the wrong were its own - *Barwick v Eng; Joint Stock Bank*  
*Mardonell v Gardiner* - The Court will not interfere with the internal administration of a Company unless there is something illegal, oppressive, fraudulent or ultra vires.  
 This is the rule in *Foss v Harbottle*.

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 AT THE END OF THIS VOLUME.



in the statutory meeting of a company, be treated as the  
annual general meeting, & is it necessary for the company  
in the year in which it holds its statutory meeting, to  
hold also another meeting & appoint as the "annual  
general meeting"? Palmer says yes - both meetings must  
be held. The Act gives no light on the subject, and  
probably a court of law would say so.

All that Sect 64 requires is that a general meeting, and  
if the company itself satisfies the requirement of Sect 64.  
But further in Table A - "the above mentioned general  
meetings (i.e. the statutory general meeting and the  
annual general meeting) shall be called ordinary  
meetings; all other <sup>general</sup> meetings shall be called extraordinary."  
But in Sect 112 the expressions "first annual  
general meeting" and "statutory meeting" both occur  
and are not synonymous.

The answer to the question is - the statutory meeting is  
not the annual general meeting, but an annual general  
meeting need be held in the year in which it was  
incorporated; so that, if the statutory meeting is held  
in yr of incorporation, the statutory meeting need be regarded  
as taking the place of the annual general meeting,  
whereas if it is held in the year after incorporation, it  
does not do so. Sect 64, however, contains no exception  
of the first year, but it is held that it applies to the  
year of incorporation would lead to unreasonable  
results, e.g. incorporated 31<sup>st</sup> Dec? Confirmation of this view  
is given by the requirement of Table A.

In *Cambridge & Colchester* - a private company had held a  
general meeting, which, so far as the time for holding it was  
concerned, might have been for the statutory meeting,  
but Lord Parker held that it could not be treated as  
the statutory meeting because the meeting concerning it  
did not state that it was the statutory meeting. *Proctor*



at the stock meeting a list of members of company  
must be before the meeting, that company has put the  
provision about directors' names, for the stockholders  
has to be filed and can't be changed before  
the meeting is held. This rule apply to private co.

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——— <i>v. South African Syndicate</i> , [1896] 2 Ch. 268; 65 L. J. (CH.) 638; 74 L. T. 527; 44 W. R. 509	193

# PRINCIPLES OF COMPANY LAW.

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## CHAPTER I.

### INTRODUCTION.

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By far the most usual and most important form of company is a "Company Limited by Shares under the Companies Act" (*a*). This form of company will be dealt with almost exclusively in this book. Suppose a number of persons intend to combine for the purpose of carrying on some business. If there are only a few of them they will probably form a partnership; but if their numbers are at all large, and particularly if they wish to limit their individual liability for losses, they will most probably decide to form or "promote" a company limited by shares under the Companies Act. This proceeding is in outline very simple. They must first decide five things. The **object** which the company is to carry out is probably agreed already: there remain the **name** of the company, the **place** where the business is to be carried on, **how far each member undertakes to be responsible for losses** and the **amount of funds** which they consider necessary to

(*a*) The Companies (Consolidation) Act, 1908, 8 Ed. VII. c. 69, which has consolidated all previous legislation relating to limited companies, and will be usually referred to in this book as "the Companies Act."

carry on the business properly. Their decision on these points is embodied in a short document called a Memorandum of Association, which must be signed by at least seven persons, who must each agree to take one or more shares in the company. The Memorandum so signed is taken to an official at Somerset House, called "**The Registrar of Companies**," a fee is paid, the registrar enters the new company on the register and prepares a certificate of incorporation, and the company is complete.

The **Memorandum of Association** then contains—

1. The name of the company, which may be almost anything, provided it ends with the word "Limited";
2. The situation of the registered office of the company;
3. The objects or powers of the company;
4. How the liability of members is limited; and
5. The amount of the capital of the company.

It is a most important document, for on it the existence of the company and all its powers depend. It fixes the powers and objects of the company as between the company and the outside world—and these powers and objects cannot be altered by the company, even if every member agrees (*b*).

The persons who are to form the company must then arrange **how** the business is to be carried on. The whole body cannot all manage, and some provision must be made for the division of the profits or losses. All such matters are dealt with in the "**Articles of Association**." This is a much longer document than

(*b*) But see p. 25, *post*.

the Memorandum, and generally provides for the appointment of **directors** (or managers of the business for the company), for division of the capital into **shares**, stating how these are to be allotted among the members, that **share certificates** shall be given to the members as evidence of their right to their shares, and that a **register** of members shall be kept as further evidence. The members generally reserve power to control the acts of the directors in many matters, and this leads to provisions for **meetings** of members, for **votes** and the passing of **resolutions** of different kinds (c). Thus the whole internal management of the company is dealt with in the **Articles**. They form a binding contract between all the members and the company; but, unlike the Memorandum, the Articles may be changed at any time if a sufficient number of shareholders desire it.

The persons forming the company may not be able to find all the capital necessary for the successful working of the business. If so, they will invite the public to join in the undertaking and subscribe for shares. This is done by means of a **prospectus**.

The **capital** may be of any amount, divided into shares of any amount. It may be £10,000,000 divided into 100,000 shares of £100 each, or £10 divided into 200 shares of 1s. each.

Any person who acquires one or more shares becomes a **member**, or, in other words, a **shareholder** or **contributory** of the company, and becomes liable, either at once or when called upon, to pay to the company the money which his share represents.

(c) Resolutions may be (1) Ordinary; (2) Extraordinary; (3) Special. See pp. 196 and 198.

When a company borrows money, it often gives to the lenders a charge or mortgage over its property, and hands to the lenders as evidence of their charge, documents called **debentures**.

A company comes to an end by being **wound up**, a **liquidator** is appointed and takes possession of all the property of the company, and, after paying the debts, he distributes it among the members. Debts secured by **debentures** or other charges are, of course, paid before unsecured debts.



## CHAPTER II.

### THE NATURE OF A LIMITED COMPANY.

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BESIDES limited companies registered under the Companies Acts there are several other forms of associations for the purpose of carrying on business.

In this chapter limited companies are contrasted with some of the more important of these forms.

#### I.—AS CONTRASTED WITH PARTNERSHIP.

##### Partnership.

(a) The “**firm**” is not a distinct “**person**”; it is made up of the several persons who compose it.

Thus a firm of A. & Co., is in law A. and B. and C. and D., and the property of the firm belongs to all the members in common. Consequently partners cannot make contracts with the firm, and judgment creditors can seize the goods of any partner.

##### Limited Companies.

A company is a distinct being or *persona*.

Thus the company S. and Co., Limited, is an entirely different person from Mr. S., even though he started it, and manages it and owns practically all the shares. The property is the property of S. & Co., Limited, and not of Mr. S. He can make contracts with the company, and his goods cannot be seized for the debts of the company.

**Salomon v. Salomon & Co., Limited, [1897] A. C. 22.**

S. had a boot business. He sold the business to a company which he formed with a capital of £40,000. The necessary seven persons were : his wife, daughter, and four sons, who took one £1 share each, and S. himself, who took 20,000 shares.

The price paid by the company to S. was £30,000; but instead of paying him cash, the company gave him 20,000 fully-paid £1 shares and 10,000 in debentures (*i.e.*, he lent the £10,000 which the company owed him for purchase-money to the company on mortgage).

Owing to strikes in the boot trade the company was wound up. The assets of the company amounted to only £6000 out of which to pay the £10,000 due to S. and secured by debentures, and a further £7000 due to unsecured creditors.

The unsecured creditors claimed that as S. & Co. was really the same person as S., he could not owe money to himself and that they should be paid their £7000 first.

VAUGHAN WILLIAMS, J., **held** that the company was a mere agent for S., and he must indemnify his agent against the losses it had sustained, by paying the £7000 himself; but it was **held** by the House of Lords—once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant.

The company could not be agent for S., for either—

- (1) it was a legal person—then it acted for itself; or
- (2) it was not—then it could not be an agent at all.

The company was not defrauded, as all the shareholders knew all about it. **The company is at law a different person altogether from the subscribers to the Memorandum.**

**Result.**—S. kept the £6000 in part payment of his loan to the company.

This is perhaps the most important case in company law, and the student should read for himself the judgment of Lord MACNAGHTEN on p. 47 of the report.

**Partnership.****Limited Companies.**

<p>(b) One partner cannot transfer his share without the consent of the others.</p>	<p>Shares are freely transferable.</p>
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**Partnership—cont.**

(c) Each partner is an agent of the firm to make contracts (Partnership Act, 1890, s. 5).

(d) The liability of each partner for the debts of the firm is unlimited, except in case of a limited partnership under the Limited Partnership Act, 1907 (*a*).

(e) Partners may make what private arrangements they like among themselves.

**Limited Companies—cont.**

A shareholder is not an agent for the company.

The liability of each shareholder may be limited either by shares or by guarantee.

There are some arrangements between members of a company which are not allowed, *e.g.*, the company cannot buy the shares of the members.

**II.—UNINCORPORATED COMPANIES.**

These were like very large partnerships; but the shares were made transferable and the management was conducted by a body of directors. They were treated in law as big partnerships, and the liability of members was unlimited.

Such companies can no longer be created, for by the Companies Act, s. 1, no company or partnership of more than ten persons can be formed for the purpose of banking, or of more than twenty persons for other business, unless it is registered under the Act or created by statute or letters patent.

(*a*) 7 Ed. VII. c. 24. Under this Act a partnership may consist of one or more "general partners" who are all liable for all the debts of the firm, and of one or more limited partners who bring in a specified amount of capital, and are not liable for more than the amount brought in. Such partnerships must be registered, and the limited partners cannot manage the business, or bind the firm.

## III.—INCORPORATED COMPANIES.

## (A.) Under the Act of 1844.

Owing to the inconvenience of the last-mentioned form of company, this Act allowed companies to be incorporated. The result was that they could sue and hold property in their own names; but the members remained individually liable, and all attempts to limit their liability failed.

## (B.) By Royal Charter. Limited Companies.

(*e.g.*, Bank of England).

(a) At common law the members were not liable up to the amount of for the debts of the Corporation (there are now some their shares or guarantee exceptions.)

(b) A corporation has all the powers of an ordinary person and they cannot be modified even by the creating charter. But the Crown may annul the charter if the limit placed on the powers by the charter is disregarded (*Baroness Wenloek v. River Dee Co.*, 36 Ch. D. 685). The powers of a company depend on its Memorandum of Association (*Ashbury Railway Carriage Co. v. Riche* (1875), L. R. 7 H. L. 671). If directors do an act which is not within the Memorandum, the shareholders cannot ratify it.

## (C.) By Special Act of Parliament.

Railway and other companies which want compulsory powers to take land and commit nuisances must be incorporated by a special Act of Parliament,

*e.g.*, the Midland Railway Company, with a capital of £183,599,999. The provisions of the special Acts required in each case were found to be very similar ; consequently several public statutes were enacted containing general provisions, and one or more of these Acts are adopted in each private Act, *e.g.* :

**The Companies Clauses Consolidation Act, 1845,**

defines the liability of shareholders and regulates borrowing powers, granting of certificates, and the constitution of such companies generally.

**The Railway Clauses Act, 1845,**

contains rules for making railways, and deals with deviations, bridges, level crossings, etc.

**The Land Clauses Consolidation Act, 1845,**

as to compulsory purchase of land, notices to be given, how the land is to be conveyed, and the purchase-money paid, etc.

**Statutory Companies.**

(a) The powers are limited by the special Act which creates the company and to which it owes its whole existence.

(b) The liability of members is limited as follows: By s. 36 of the Companies Clauses Act, if execution is levied against the company, and there is

**Limited Companies.**

The powers depend on the Memorandum.

Limited by shares or guarantee.

**Statutory Companies—*cont.***

not enough to pay the debt, the creditor may issue execution against the shareholders to the extent of their shares (*a*).

(c) The company can only borrow money when the whole of its capital has been subscribed and at least half actually paid up, and even then can usually only borrow to the extent of one-third of its capital.

(d) The company cannot lease its undertaking without the consent of Parliament.

**Limited Companies—*cont.***

The borrowing powers of the company are usually unlimited, but may be limited by the Memorandum.

If the Memorandum allows it, the company can lease the whole of its undertaking.

#### IV.—BUILDING SOCIETIES, INDUSTRIAL, PROVIDENT, AND FRIENDLY SOCIETIES.

Are governed by their own special Acts. They are not companies, but the liability of members is limited.

#### V.—OTHER COMPANIES UNDER THE COMPANIES ACT.

##### 1. Unlimited companies:

The liability of the members is not limited at all.

(a) This used to be done by *scire facias*, but now by application to a judge under O. XLII., r. 23.

These companies are rare, their position is much the same as companies incorporated under the Act of 1844.

2. Companies limited by guarantee :

Each member undertakes to be liable to pay the debts of the company up to a certain amount, but the capital of the company is not usually divided into shares.

Further details of this form of company will be found on p. 212.

### Usual Steps in the Formation of a Company.

*First*, prepare the Memorandum of Association (Chapter III.).

*Secondly*, prepare the Articles of Association (if any), Chapter IV.

*Thirdly*, prepare the Preliminary Contracts (if any), Chapter V., s. 1.

*Fourthly*, the Company must be registered (Chapter V., s. 2).

*Fifthly*, the necessary working capital must be obtained (Chapter VI.).



# **Specimen Form of Memorandum of Association.**

THE COMPANIES (CONSOLIDATION) ACT, 1908.

*Company Limited by Shares.*

Memorandum of Association of Blank Company,  
Limited.

1. The name of the company is "Blank Company, Limited."

2. The registered office of the company will be situate in England.

3. The objects for which the company is established are :

(a) To acquire and take over as a going concern the undertaking, and all or any of the assets and liabilities of Jones Brothers, and with a view thereto to adopt the agreement referred to in clause 3 of the company's Articles of Association, and to carry the same into effect with or without modification.

(b) To carry on business as brewers, maltsters, corn merchants, distillers, hop merchants, wine and spirit merchants and importers, manufacturers of aerated and mineral waters and other drinks, licensed victuallers, hotel keepers, beerhouse keepers, restaurant keepers, lodging-house keepers, farmers, dairymen, ice merchants, tobacconists, brick makers, bath keepers, and to buy, sell, manipulate, and deal (both wholesale and retail) in commodities of all kinds which can conveniently

be dealt in by the company in connection with any of its objects and to carry on any other businesses, whether manufacturing or otherwise, capable of being conveniently carried on in connection with any of the company's objects, or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights.

\* \* \* \* \*

- (f) To enter into partnership or into any arrangement for sharing profits, union of interest, reciprocal concession, or co-operation with any person or company carrying on or about to carry on any business which this company is authorised to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in, or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, re-issue with or without guarantee, or otherwise deal with such shares or securities.

\* \* \* \* \*

- (h) To aid in the establishment and support of associations or institutions calculated to benefit persons employed by the company, or having dealings with the company, to provide for the welfare of persons in the employment of the company, or formerly in the employment of the company, and the widows and children of such persons and others dependent on them,

by granting money or pensions, providing schools, reading rooms, places of recreation, or subscribing to sick or benefit clubs, or societies, to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition, and generally for any purpose which may seem likely, whether directly or indirectly, to promote the development of the business of the company, or to prevent its contraction, or for any public, general, or useful object.

- (i) To sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular wholly or partly for shares, debentures, debenture stock, or securities of any other company, and to accept and take any such shares, stock, debentures, or securities in satisfaction of any money payable to, or any claim of, the company.

\* \* \* \* \*

- (u) To do all such things as are incidental or conducive to the attainment of any of the above-mentioned objects.

4. The liability of the members is limited.

5. The capital of the company is £25,000, divided into 25,000 shares of £1 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names.

Names, Addresses, and Descriptions of Subscribers.					Number of Shares taken by each Subscriber.
John Jones, of	...	...	...	...	One.
William Smith, of	...	...	...	...	One.
Thomas Brown, of	...	...	...	...	One.
Benjamin Green, of	...	...	...	...	One.
Andrew Black, of	...	...	...	...	One.
Arthur Drew, of	...	...	...	...	One.
John Smith, of	...	...	...	...	One.

Dated this 3rd day of February, 1910.

Witness to all the above written signatures,

GEORGE BROWNE.

## CHAPTER III.

### MEMORANDUM OF ASSOCIATION.

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Before reading this chapter read the form of Memorandum on p. 13, which is a Memorandum of a company actually in existence, but owing to the great length of clause 3, several of the paragraphs have been omitted.

This chapter should be read as explaining the form, clause by clause.

#### SECTION 1.

##### Clause I.—The Name.

Any name may be chosen subject to the following restrictions :

1. The last word of the name must be "limited."
2. The words "royal" or "imperial" and other similar words must not be used without authority.
3. The name must not resemble that of any other existing company or firm.

**As to 1.**—When an old business is turned into a limited company, the old name is often retained with the addition of "limited." The name should be as short as possible, *e.g.*, "Jons, Limited," and "The Palmer Tyre, Limited."

The name (with the word "limited ") must be painted

up (*a*) or affixed to the outside of every office or place in which business of the company is carried on, in a conspicuous position, easily legible, and on all cheques (*b*), notices, advertisements, bills, etc., of the company.

This is to ensure that all persons dealing with the company shall have clear notice that the liability of the members is limited.

If the company makes a contract without the use of the word "limited," the effect may be most serious for the officers of the company; suppose, for instance, Mr. Salomon, contracting on behalf of his company, had omitted the word "limited," the contract would have been made by him personally (*c*); and—

**Atkins & Co., Ltd. v. Wardle** (1889), 58 L. J. Q. B. 377.

A, B, and C, the directors of the South Shields Salt Water Baths Co., limited, accepted bills thus:—"Accepted A, B, C, directors of the S. Shields Salt Water Baths Company." **Held**, the directors were personally liable.

There is one exception to the rule that the word "limited" must be used. **Companies formed to promote art, science, etc.**, which do not propose to pay dividends, but to apply all gains towards the working of the company, may register a name **without the word "limited"** (*d*). They thus become corporations, and can own property and sue in their own names, and the liability of the members is limited, *e.g.*, Newnham College, Cambridge, and the Cyclists' Touring Club.

(*a*) Companies Act, s. 63. Penalty, £5 a day; and the same, if a person, not being a limited company, uses the word "Limited."

(*b*) Companies Act, s. 282. Penalty, £50, and personal liability if the company does not pay.

(*c*) See also *Penrose v. Martyr* (1858), E. B. & E. 499; *Chapman v. Smethurst*, [1909] W. N. 65.

(*d*) Companies Act, ss. 19 and 20. A licence must be obtained from the Board of Trade, and it may be revoked.

As to 3.—A new company may not select a name so like that of an existing company or firm as to lead to confusion (*e*). The registrar may refuse to register such a name, or may be prevented by injunction from registering it, and even if he does register it, the other company may get an injunction and have it removed.

This jurisdiction is not confined to cases where the old name is actually registered.

**Société Panhard et Levassor v. Panhard Levassor Motor Co., Ltd., [1901] 2 Ch. 513.**

The well-known French company had no agency in England, but their cars were used in England. An English company was formed—capital £100, with only seven members. The object was to prevent the French company from being registered in England in their own name, and thus competing more successfully with English firms:—**Held**, the name of the English company must be struck off the register. The seven members were ordered, either—

- (1) to change the name with the consent of the Board of Trade, or
- (2) to wind up the company.

### Change of Name.

A company may change its name, either—

- (1) by special resolution with the consent of the Board of Trade, which will always be given if there is a good reason for the change, or
- (2) if it has by inadvertence registered a name similar to that of an existing company, then by consent of the registrar (*f*).

In order to prevent difficulties arising from a change of name it is enacted that all proceedings brought by

(*c*) *Re Cash & Co.*, [1907] 2 Ch. 189; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] W. N. 144.

(*f*) Companies Act, s. 8.

or against the company in its old name remain good notwithstanding any change of name (*g*).

## SECTION 2.

### Clause II.—The Registered Office.

The Memorandum must state whether the office is to be in England (which includes Wales), Scotland or Ireland: such information is all that is required; for it is enough to show where the company will be registered; thus, if “in England,” it will be registered at Somerset House.

This fixes the **domicil** of the company, and it cannot be changed without the consent of Parliament. But the situation of the office may be changed from one part of England to another by giving notice to the Registrar.

Every company must have a registered office (*h*). The register of members (*i*) is kept there: writs and notices must be served there; but if there is no registered office, an order for substituted service will be made, or the writ may be served on the secretary and directors at an office which is not registered.

#### Re Fortune Copper Mining Co. (1870), 10 Eq. 390.

The registered office of the company had been pulled down. The writ was served on the secretary and directors at an unregistered office :—**Held**, good service.

(*g*) Companies Act, s. 8 (5).

(*h*) Companies Act, s. 62. Penalty, £5 a day.

(*i*) It should be clearly understood that the register at Somerset House kept by the Registrar is quite distinct from the company's own register of members kept by its own secretary.



## SECTION 3.

## Clause III.—The Objects of the Company.

The company cannot do anything outside the powers given in the Memorandum—anything so done becomes *ultra vires*, and the Memorandum cannot be changed without leave of the court.

If an act is done by the directors which is *ultra vires* (beyond the powers of) the company, it is void, and the company cannot make it valid, even if every member assents to it.

Ashbury Railway Carriage Co. v. Riche (1875), L. R. 7 H. L. p. 672.

The Memorandum gave the company power to make and sell railway carriages. The directors bought a railway concession in Belgium. The Articles gave express power to the company to extend its business beyond the Memorandum by special resolution. The company passed a special resolution to ratify the purchase:—**Held**, the purchase was bad. “If every shareholder had been in the room, and if every shareholder had said, ‘that is a contract which we authorise the directors to make,’ it would be void. The shareholders would thereby by unanimous consent, have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing” (*per* Lord CAIRNS, L.C.).

This rule is meant to protect future shareholders and the public at large who deal with the company.

But if the act had been *ultra vires* (beyond the powers of) the directors only, the shareholders could have ratified it.

Or if it had been *ultra vires* the Articles, the company could have altered its Articles in the proper way.

See the last-mentioned case, at p. 674 of the report.

If property is acquired by *ultra vires* expenditure, the company's rights over it may be protected.

**National Telephone Co. v. Constables of St. Peter Port,**  
[1900] A. C. 317, 321.

The company put up telephone wires in Guernsey. The defendants cut them down. There was no power in the Memorandum to put up wires there :—**Held**, that fact alone would not prevent the company from suing for damage done to the wires.

The powers in the Memorandum must not, however, be construed strictly, and the company may do anything which is **fairly incidental** to the powers specified.

**Foster v. London, Chatham and Dover Rail. Co.,** [1895]  
1 Q. B. 711.

The company acquired a piece of land for the purposes of its railway. The railway was erected on arches. The company let the arches as workshops, etc. The neighbours objected (on account of noise and rubbish), and claimed that it was *ultra vires* :—**Held**, valid, as being fairly incidental to the powers of the company.

On the other hand, the following was held **not to be incidental**.

**Attorney-General v. London County Council,** [1902]  
A. C. 165.

The council had power to run tramways. It ran omnibuses to feed the tramways.—**Held**, this was outside its powers.

N.B.—These were statutory companies, but the same principle applies to the special statute as to a Memorandum of Association.

Powers not expressly mentioned in the Memorandum may be implied if they are warranted by the constitution of the company. Thus a trading company has implied power to borrow (see p. 136) and to sell land (*Re Kingsbury Collicries, Ltd.*, [1907] W. N. p. 118),

and to give pensions or other rewards to its servants or employee (*j*).

Very wide powers conferred by general words in the Memorandum (such as clause (u) in the form on p. 15) have practically no effect. A company usually has a **main object**, which is put first in the list of its objects—or there may be two or more main objects, as in clauses (a) and (b) in the form on p. 13.

The detailed powers which are usually set out under clause 3 of the Memorandum are usually construed as merely incidental to the **main** objects of the company. The main objects can usually be ascertained from the first few paragraphs of clause 3, read in conjunction with the name of the company (*Re Crown Bank*, [1890] 44 Ch. D. 634). Compare also—

*Stephens v. Mysore Reefs, Limited*, [1902] 1 Ch. 745;  
*Pedlar v. Road Block Gold Mines, Limited*, [1905]  
2 Ch. 427.

In both these cases the Memorandum (clause 2) authorised the company to acquire gold mines “in Mysore and elsewhere,” and the Memorandum in each case contained wide general clauses:—**Held**,—**In the first case**, that the company **could not** purchase an option with a view to forming a new company to work mines on the Gold Coast; **in the second case**, that the company **could** purchase and work a gold mine in Bombay; because the first did not come within clause 2 and the second did.

If the **main object** is gone, the company must be wound up.

*Re Amalgamated Syndicate*, [1897] 2 Ch. 600.

The company was formed to erect stands and let out seats for the Diamond Jubilee. The Memorandum also contained power

(*j*) *Cyclist Touring Club v. Hopkinson*, [1910] 1 Ch. 179.

(d) to carry on all kinds of promotion business, and (e) to act as house agents. There was a heavy loss. After the Jubilee the directors proposed to carry on business under clauses (d) and (e):—**Held**, the company must be wound up, its **substratum** or **main object** having gone. VAUGHAN WILLIAMS, J.: “I ought not to read these clauses as defining a succession of objects different from the main object, but . . . as general powers merely providing for the execution by the company of matters which are only incidental to its main objects.”

It appears, therefore, that the usual practice of setting out in great detail in the Memorandum all sorts of independent powers to be exercised by the company really adds nothing to the powers of the company, and is erroneous (*k*) and misleading.

The objects of a company **must not be illegal**, *e.g.* to carry on a lottery, or to do something forbidden by the Companies Act, such as buying its own shares. See p. 77.

A power given in the Memorandum to sell the whole of its undertaking (as in clause (i) in the form on p. 14) is of doubtful validity, as it purports to give the company power to destroy its main object (*l*).

A power is often taken (as in clause (a) in the form on p. 13) to adopt an agreement already entered into by an agent for the company before its formation. The law relating to such contracts is peculiar and will be discussed in Chapter V.

(*k*) *Bisgood v. Henderson's Transvaal, Limited*, [1908] 1 Ch. at p. 757; see also the form given in the third Schedule to the Companies Act.

(*l*) *Bisgood v. Henderson's Transvaal, Limited (ante)*, overruling *Cotton v. Imperial, etc., Corporation*, [1892] 3 Ch. 454, Buckley, p. 437.

### The powers of a company may be extended.

A company may alter or extend its memorandum (*m*) by special resolution confirmed by the court (*n*) if the alteration is required to enable the company—

- (a) to carry on its business more economically or more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or
- (c) to enlarge or change the local area of its operations ; or
- (d) to carry on some other business which may be conveniently combined with its own ; or
- (e) to restrict or abandon any of its objects (*o*).

But the Court will not allow entirely new powers to be acquired except on special terms.

### Re Cyclists' Touring Club, [1907] 1 Ch. 269.

The company was registered without the word "limited" (see p. 18). The Memorandum stated that the objects were "to promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads." The company proposed to alter its powers by admitting all tourists, including motorists :—  
Held, the alteration must not be allowed, as it did not fall within clause (a) to (e) of the section : especially as one of the objects of the company was to protect cyclists against motorists.

The Court may require an alteration in the name of the company (*p*), unless such an alteration would be very inconvenient (*q*).

(*m*) Companies Act, s. 9.

(*n*) This includes any judge of the Chancery Division. *Re Essex, etc., Society Limited*, [1909] W. N. 102.

(*o*) *Jewish Colonial Trust Limited*, [1908] 2 Ch. 287.

(*p*) *Indian Mechanical Gold Co.*, [1891] 3 Ch. 538.

(*q*) *Trust Co. of Australasia*, [1908] W. N. 229.

The procedure is by petition to the court (*r*).

A company governed by a deed of settlement may adopt a Memorandum and articles in its place by the same procedure (sect. 264).

A company can hold lands in spite of the statutes of Mortmain.

By sect. 16 (2) of the Companies Act a company registered under the Act can hold land except companies formed to promote art, science, charity, or other object not involving the acquisition of gain (*s*).

#### SECTION 4.

##### Clause IV.—The Limitation of Liability.

A statement that the liability of members is limited (as in the form on p. 15) without more, means “limited by shares”—that is, that no member can be called upon to pay more than the nominal amount of his share, or so much thereof as remains unpaid; and, if his shares be fully paid up, his liability is nil.

A company may be limited by guarantee. Then clause 4 will run, “Every member of the company undertakes to contribute to the assets of the company . . . for payment of the debts . . . etc. . . . such amount as may be required, not exceeding £ .”

This form of company is not nearly so common as the former, and is dealt with on p. 212.

(*r*) A form of petition will be found under the heading “Reduction of Capital.”

(*s*) S. 19. A company registered in a British possession may hold lands if it has filed certain documents with the Registrar, ss. 274 and 275.

## SECTION 5.

## Clause V.—The Capital Clause.

This clause must state the amount of the nominal capital of the company and the number and amount of the shares (*l*). See clause 5 of the form on p. 15.

There is no legal limit to the amount of capital or of each share: some companies have a capital of only £7, while the Union of London and Smith's Bank has a capital of £20,000,000. The shares may be 1s. each or £5000, or any other amount.

The amount of capital is determined by the cost of starting the business, and the amount required for working it when started.

Thus, suppose the business and goodwill are to be purchased by the company for £200,000 in cash and £100,000 in shares, and £100,000 is needed for working capital.

Allowing £50,000 for emergencies, the amount of **cash** required to be raised would be £350,000. £150,000 of this may be borrowed by the issue of **debentures**, say 1500 debentures of £100 each. This will leave £200,000 to be subscribed in cash, besides the £100,000 worth of shares for the vendors of the business.

The capital of the company will then be £300,000, divided into (say) 1000 five per cent. preference shares of £100 each, and 200,000 ordinary shares of £1 each (for money borrowed on debentures is not "**capital**").

(*l*) Companies Act, s. 3.

The fact that there are different classes of shares need not be stated in the Memorandum, but may be provided for in the Articles.

Sometimes the rights of the preference shareholders are specified in the Memorandum so as to give them further security, for it is then impossible for the company to change their rights except by leave of the court or by agreement sanctioned by a resolution passed by three-quarters of the preference shareholders (*u*).

The Memorandum may give express power to the company to alter these rights.

But if this is done, there seems to be no particular reason for setting out the rights in the Memorandum.

**Other provisions** may be inserted in the Memorandum, but they are not necessary.

## SECTION 6.

### Association Clause and Subscription.

See the clause at the end of the form on p. 16.

There must be **at least** seven persons, and they must subscribe for **at least** one share each.

The full name and description of each must be set out.

Any one may subscribe, even an infant (*Re Laxon & Co.*, [1892] 3 Ch. 555).

His contract to take shares is voidable but not void.

All the members may be foreigners, provided the business or its management is to be carried on in England. And an English registered company can

(*u*) See Companies Act, s. 45, *post*, p. 123.



own a British ship though all its members are foreigners (*R. v. Arnand* (1846), 9 Q. B. 806).

The signatures must be attested by a witness; but one witness to all the signatures is sufficient.

The duties of the subscribers are—

- (1) to pay for the shares for which they have subscribed;
- (2) to sign the Articles of Association;
- (3) to appoint the first directors; and
- (4) usually to act as directors until such appointment (*c*).

### Form of Articles of Association.

The following are some of the clauses contained in the articles of a company now in existence, and will serve to show some of the matters usually dealt with.

*(Many of the clauses are omitted for the sake of brevity.)*

#### THE COMPANIES (CONSOLIDATION) ACT, 1908.

##### *Company limited by Shares.*

##### Articles of Association of Blank Company, Limited.

1. *Definitions*.—"The Companies Act" means the Companies (Consolidation) Act, 1908. "The Office" means the registered office of the Company. "Month" means calendar month. Words importing the singular number include the plural number.

(*x*) This depends on the Articles.

2. *Table "A" not to apply.*—The regulations contained in Table "A" in the First Schedule to the Companies Act, shall not apply to the company.

3. *Preliminary contract.*—The company shall forthwith adopt the agreement dated the 31st December, 1909, and made between William Jones of the one part and Alfred Smith on behalf of this company of the other part, which has, for the purpose of identification, been initialed by three of the subscribers to the Memorandum of Association, and the directors shall carry the said agreement into effect with or without modification.

#### SHARES.

4. *Capital.*—The capital of the company shall be divided into 5000 preference shares of £1 each, and 20,000 ordinary shares of £1 each. The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum, and the right in a winding up of the company to repayment of capital in priority to all other shares.

6. *Underwriting commission.*—The directors may exercise the powers conferred on the company by s. 89 of the Companies Act, but so that the commission in such section mentioned shall not exceed twenty-five per cent., payable either in cash or shares, on the shares in each case offered for subscription.

#### CERTIFICATES.

11. *Certificates.*—The certificates of title to shares shall be issued under the seal of the company, and signed in such manner as the directors shall prescribe,

12. *Members entitled to one gratis.*—Every member shall be entitled without payment to one certificate for all the shares registered in his name. Every certificate of shares shall specify the numbers of the shares in respect of which it is issued, and the amount paid up thereon.

### CALLS.

15. *Calls.*—The directors may, from time to time, make such calls as they think fit upon the members in respect of all money unpaid on the shares held by them, and not by the conditions of allotment thereof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the time and at the place appointed by the directors. A call may be made payable either in one sum or by two or more instalments. A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed. Seven days' notice at least of any call shall be given specifying the time and place of payment, and to whom such call shall be paid.

### FORFEITURE AND LIEN.

19. *If call or instalment not paid, notice may be served.*—If any member fail to pay any call or instalment on or before the day appointed for the payment of the same, the directors may at any time thereafter during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same, together with any interest that may

have accrued, and all expenses that may have been incurred by the company by reason of such non-payment.

20. (Form of notice.)

21. *If notice not complied with, shares may be forfeited.*—If the requirements of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter, before payment of all calls or instalments, interest and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited shares, and not actually paid before the forfeiture.

23. *Forfeited shares become the property of the company.*—Any shares so forfeited shall be deemed to be the property of the company and the directors may sell, re-allot or otherwise dispose of the same in such manner as they think fit, and either subject to or freed from the calls made prior to forfeiture.

24. *Arrears payable, notwithstanding forfeiture.*—Any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, instalments, interest, and expenses owing upon or in respect of such shares at the time of forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of ten per cent. per annum, and the directors shall enforce the payment of such moneys or any part thereof if they think fit, but shall be under no obligation so to do.

25. *Power to annul forfeiture.*—The directors may, at any time before the share so forfeited shall have been sold, re-allotted, or otherwise disposed of, annul the forfeiture thereof upon such conditions as they think fit.

26. *Company's lien.*—The company shall have a first and paramount lien upon all the shares (other than fully paid-up shares) registered in the name of each member (whether solely or jointly with others) for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends declared on such shares.

27. *As to enforcing lien by sale.*—For the purpose of enforcing such lien the directors may sell the shares subject thereto in such manner as they think fit; but no sale shall be made until such period as aforesaid shall have arrived, and until notice in writing of the intention to sell shall have been served on such member, his executors or administrators, and default shall have been made by him or them in the payment, fulfilment, or discharge of such debts, liabilities, or engagements, for seven days after such notice.

#### TRANSFER AND TRANSMISSION SHARES.

30. *Execution of transfer.*—The instrument of transfer shall be in writing, signed both by the transferor and the transferee, and the transferor shall be deemed

to remain a holder of the shares until the name of the transferee is entered in the register in respect thereof.

31. *Form of transfer*.—The instrument of transfer of any shares shall be in the usual or common form, or in such other form as the directors shall approve.

32. *Restraint on transfer*.—The directors may decline to register any transfer of shares upon which the company has a lien, and in the case of shares not fully paid up, may refuse to register a transfer without assigning any reason therefor.

37. *Trusts not recognised*.—The company shall be entitled to treat the registered holder of any share as the absolute owner thereof and accordingly shall not be bound or affected by notice of any trust, charge, or other interest, legal or equitable, partial or absolute, by virtue whereof any person other than the registered holder or the survivor of joint holders shall be, or shall claim to be, interested in any share.

39. *Persons entitled by transmission to be registered*.—Where any person entitled under the transmission clause to any partly paid shares shall fail for two months after being thereto required by the directors in writing to procure himself or some other person to be registered as holder of the shares, the directors may, at any time thereafter, before compliance with the request, by resolution, forfeit such shares.

#### SHARE WARRANTS.

40. *Power to issue share warrants—Conditions*.—The company, with respect to fully paid-up shares, may issue warrants (hereinafter called “share warrants”) stating

that the bearer is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of future dividends on the shares included in such warrants. The directors may determine, and from time to time vary the conditions upon which share warrants shall be issued, and in particular, upon which a new share warrant or coupon shall be issued in the place of one worn out, defaced, lost, or destroyed, upon which the bearer of a share warrant shall be entitled to attend and vote at general meetings, and upon which a share warrant may be surrendered and the name of the holder entered in the register in respect of the shares therein specified. Subject to such conditions, and to these presents, the bearer of a share warrant shall be a member to the full extent. The holder of a share warrant shall be subject to the conditions for the time being in force, whether made before or after the issue of such warrant.

#### CONVERSION OF SHARES INTO STOCK.

41. *Paid-up shares convertible into stock.*—The company (in general meeting) may convert any paid-up shares into stock, and re-convert any stock into fully-paid shares of any denomination. When any shares have been converted into stock, the several holders of such stock may henceforth transfer their respective interests therein, or any part of such interests, in the manner and subject to the regulations hereinbefore provided. Provided always that the directors may from time to time, if they think fit, fix the minimum amount of stock transferable, and direct that fractions of a pound shall not be dealt with, but with power, at

their discretion, to waive such rules in any particular case.

#### INCREASE AND REDUCTION OF CAPITAL.

43. *Increase of capital.*—The company in general meeting may, from time to time, increase the capital by the creation of new shares of such amount as may be deemed expedient.

48. *Reduction of capital.*—The company may from time to time reduce its capital or cancel shares in any manner permitted by law, and may consolidate or subdivide any of its shares, and paid-up capital may be paid off upon the footing that the amount may be called up again or otherwise.

#### BORROWING POWERS.

49. *Borrowing powers.*—The directors may from time to time, as in their judgment they may deem expedient, borrow, for the purposes of the company, any sum or sums of money, and they may secure the moneys so borrowed by the issue of debentures or debenture stock, mortgages, bonds or other instruments of charge upon the whole or any part or parts of the company's property or assets (both present and future) including its uncalled capital for the time being, or otherwise as they may think fit. The directors shall duly comply with the requirements of section 93 of the Companies Act, or any statutory modification thereof in regard to the registration of mortgages and charges therein specified and otherwise.

#### GENERAL MEETINGS.

50. *Statutory meeting.*—The statutory meeting of the company shall (as required by section 65 of the Com-



panies Act) be held within a period of not less than one month or more than three months from the date at which the company shall be entitled to commence business, and the directors shall comply with the other requirements of that section, as to the report to be submitted and otherwise.

51. *General meetings.*—Other general meetings shall be held once in the year 1910 and once in every subsequent year, at such time (not being more than fifteen months from the date of the last preceding meeting) and at such place as may be prescribed by the company in general meeting; and, if no other time or place is prescribed, a general meeting shall be held at such time (subject as aforesaid) and at such place as may be determined by the directors.

53. *When extraordinary meeting to be called.*—The directors may, whenever they think fit, and they shall upon a requisition made in writing by members holding not less than one-tenth of the issued capital of the company, upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

58. *Notices of meetings.*—Seven clear days' notice at the least, specifying the place, day, and hour of meeting, and, in case of special business, the general nature of such business, shall, except as next hereinafter mentioned, be given by notice sent by post or otherwise served as hereinafter provided.

59. *Accidental omission of notice not to invalidate resolution.*—The accidental omission to give any such notice to any of the members or the non-receipt by

any member of such notice, shall not invalidate any resolution passed at such meeting.

#### PROCEEDINGS AT GENERAL MEETINGS.

60. *Business of ordinary general meetings.*—The business of an annual general meeting shall be to receive and consider the statement of income and expenditure, the balance-sheet, the ordinary reports of the directors and auditors, to elect directors and other officers in the place of those retiring by rotation or otherwise, to declare dividends and to transact any other business which under these presents ought to be transacted at an annual general meeting. All other business transacted at an annual general meeting, and all business transacted at an extraordinary general meeting shall be deemed special.

64. *How questions decided.*—Every question submitted to a meeting shall, unless unanimously decided, be decided in the first instance, by a show of hands, and in the case of an equality of votes the chairman shall, both on show of hands and at a poll, have a casting vote in addition to the vote or votes to which he may be entitled as a member.

65. *Declaration of chairman conclusive.*—At any general meeting (unless a poll is demanded in writing on or before the chairman's declaration next hereinafter referred to, by at least five members personally present, or by a member or members holding or representing by proxy or entitled to vote in respect of at least one-tenth of the nominal amount of the capital represented at the meeting) a declaration by the chairman that a resolution has been carried or carried by a particular

majority, or lost or not carried by a particular majority, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

#### VOTES OF MEMBERS.

71. *Voting power*.—Subject to any special terms as to voting upon which any shares may have been issued, or for the time being be held, every member of the company, upon a show of hands, shall have one vote, and upon a poll one vote for every share held by him of any class.

74. *Proxies*.—Votes may be given personally or by proxy. The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under its common seal. No person shall be appointed a proxy who is not a member of the company, and qualified to vote, except that a corporation holding shares conferring the right to vote may appoint one of its officers or members its proxy although not a member of the company.

#### DIRECTORS.

80. *Number of directors*.—Unless and until otherwise determined by a general meeting, the number of directors shall not be less than three or more than seven. The continuing directors may act, notwithstanding any vacancy in their body, but so that if the number falls below the minimum fixed by the regulations of the company for the time being, the directors

shall not, except for the purpose of filling up vacancies or summoning a general meeting of the company, act so long as the number is below the minimum.

83. *Remuneration*.—The directors (other than the managing director, if any) shall receive, by way of remuneration in respect of each financial year of the company, fifty guineas per annum for each director, with an addition of fifty guineas per annum for the chairman, and a sum equal to five per cent. of the net profits of the company divided amongst the members in that year. In addition to their remuneration the directors shall be paid all travelling and other expenses incurred while on the business of the company.

84. *Qualification*.—The qualification of a director shall be the holding of 300 shares of the company. A director may act before acquiring his qualification, but if not already qualified, shall acquire the same within two months from his appointment.

85. *When office of director vacated*.—The office of director shall be, *ipso facto*, vacated:

- (a) If he become bankrupt, or suspend payment, or file a petition for liquidation of his affairs, or compound with his creditors.
- (b) If he be found a lunatic or become of unsound mind.
- (c) If he absent himself from the meetings of the directors for a period of six calendar months without special leave of absence from the directors, unless he is absent on the business of the company, or if he fails to attend at

least one half of the board meetings held in any year, etc.

86. *Directors interested in contracts with company.*—No director, or intended director, and no person standing in a fiduciary capacity or position to the company shall be disqualified by his office from contracting with the company, either as vendor, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the company, with any company, or partnership of or in which any such director or person shall be a member, or otherwise interested, be avoided, nor shall any director or person so contracting or being such member, or so interested, be liable to account to the company for any profit realised by any such contract or arrangement by reason only of such director holding that office, or of the fiduciary relation thereby established. Provided that the fact of his being interested therein, and the nature of his interest, shall be disclosed by him to the meeting of the directors at which the contract is determined on if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and except in respect of the agreement referred to in Article 3 hereof, no director shall vote in respect of any such contract or arrangement, and if he do vote his vote shall not be counted. A general notice that a director is a member of any firm or company, and is to be regarded as interested in all transactions with such firm or company shall be sufficient disclosure under this Article, and after such general notice shall have been given it shall not be necessary to give any special notice or notices relating to any particular transaction with such firm or company.

## ROTATION OF DIRECTORS.

87. *Retirement of directors.*—At the annual general meeting to be held in the year 1913, and at the annual general meeting in each succeeding year, one-third of the directors, or if their number is not a multiple of three then the number nearest to, but not exceeding one-third of the directors, shall retire from office.

99. *Acts valid, notwithstanding defective appointment.*—All acts done at any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, or that their or any of their offices were for any reason vacated, be as valid as if every such person had been duly appointed, and was qualified to be a director.

## POWERS OF DIRECTORS.

106. *General powers.*—The management of the business of the company shall be vested in the directors, who may exercise all such powers of the company as are not hereby, or by statute, expressly directed or required to be exercised by the company in general meeting, subject nevertheless to any regulations of these Articles, and to the provisions of the Companies Act, and to such regulations not being inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general

meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

#### MANAGING DIRECTORS.

108. *Power to appoint.*—The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company, either for a fixed term, or without any limitation as to the period for which he or they are to hold such office, and may, subject to any contract between him or them and the company, from time to time, remove or dismiss him or them from office, and appoint others in his or their place.

#### DIVIDENDS.

113. *Dividends.*—The company in general meeting may (subject to any preference or priority for the time being existing and subject to the provision hereinafter contained), declare a dividend to be paid to the members in proportion to the amount paid up or credited as paid up on the shares. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

114. *Only out of profits.*—No dividend shall be payable except out of the profits arising from the business of the company. The declaration of the directors as to the amount of the net profits of the company shall be conclusive.

#### REGISTERS.

119. The company shall keep registers of members, directors, and mortgages as required by sections 25,



75, and 100 respectively of the Companies Act and shall make the returns required by section 26 of the Companies Act (*a*).

#### ACCOUNTS.

122. *Proper accounts to be kept.*—The directors shall cause true accounts to be kept of the sums of money received and expended by the company, and all matters in respect of which such receipt and expenditure take place, and of the assets, credits and liabilities of the company. Such of the books of account as shall be in the United Kingdom shall be kept at the registered office of the company, or at such other place or places as the directors think fit.

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#### Names, Addresses, and Descriptions of Subscribers.

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John Jones, of	.
William Smith, of	.
Thomas Brown, of	.
Benjamin Green, of	.
Andrew Black, of	.
Arthur Drew, of	.
John Smith, of	.

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Dated this 3rd day of February, 1910.

Witness to all the above written signatures,

GEORGE BROWNE.

(*a*) Clauses of this character are frequently inserted to act as reminders to the officers of the company.



## CHAPTER IV.

## THE ARTICLES OF ASSOCIATION.

BEFORE reading this Chapter, read the form of Articles of Association on the last five pages, which Articles are actually in use by an existing company. (Owing to the length of the whole document, only the more important and instructive clauses are set out.)

The Articles must be printed and signed by the same persons as signed the Memorandum, with at least one witness, and stamped as a deed.

It is not necessary to have Articles. If there are none, a form of Articles called **Table A.** applies, and becomes the Articles of the company.

The **regulations** of a company are the Articles, together with any special resolutions passed by the company. That is to say, the regulations which the members are under a statutory covenant to observe.

The Articles **bind the company and the members** thereof to the same extent as if they had been signed and sealed by each member and contained covenants by each member to observe them (*a*), and any new regulations are as binding as if they had been originally inserted in the Articles (*b*).

(*a*) Companies Act, s. 14.

(*b*) Companies Act, s. 13.

**Result.**

- (1) Each member is bound to the company ;
- (2) Each member is bound to the other members ;

**Borland v. Steel Bros.**, [1901] 1 Ch. 279.

The Articles, as altered, provided that the shares of any member who became bankrupt should be sold to certain persons at a certain price. B. became bankrupt. His trustee claimed that he was not bound by the altered article:—**Held**, the Articles, as altered in the proper way, **are a personal contract between B. and the rest of the members**, and B. and his trustee are bound (*c*).

- (3) Neither the company nor the members are bound to outsiders ;

**Eley v. Positive, etc., Co.** (1876), 1 Ex. D. 88.

The Articles provided that E. should be employed as solicitor for the company. The company employed other solicitors. E. sued the company for breach of contract:—**Held**, there was no contract with E. and he could not sue.

- (4) The company is **not** bound to the members.

(NOTE.—The company is only bound “as if the **members** had signed,” and the signature of the members cannot bind the company.)

But the company may be liable on an implied contract in the terms of the Articles.

**New British Iron Co.**, [1898] 1 Ch. 324.

Article 62 provided that the remuneration of the directors should be £1000. A director sued the company for his fees:—**Held**, “the Article is not in itself a contract between the company and the directors : it is only part of the contract constituted by the Articles between the members of the company *inter se*. . . .

(*c*) And see *Attorney-General v. Jameson*, [1904] 2 I. R. 646.

“ But where, on the footing of that Article, the directors are employed by the company and accept office, the terms of Article 62 are embodied in and form part of the contract between the company and the directors.

**The Articles are subject to the Memorandum,** and cannot give powers which are not given by the Memorandum. But for purposes of construction on points which need not necessarily be put in the Memorandum, they are to be read together, and the Articles may then explain or amplify the Memorandum (*London Financial Association v. Kell* (1883), 26 Ch. D. 107).

**The Articles must not contain anything illegal or ultra vires the company.**

Any Article which is the same in substance as any Article in Table A., cannot be void on these grounds (*Lock v. Queensland Investment Co.*, [1896] A. C. 461).

**The Articles may be freely altered** by the company, subject to the two last rules, and provided

(1) **They are altered by a special resolution at a general meeting.**

*I.e.*, a resolution passed by a three-quarters majority of those present at a meeting of which due notice has been given, and confirmed at another meeting (two weeks to one month later), by a simple majority of those present (*d*).

(2) **They do not go outside the powers given by the Memorandum.**

It was at one time held (in *Hutton v. Scarborough Cliff Hotel Co.* (1865), 2 Drew. & Sm. 521), that if the

alteration altered the constitution of the company, it was void. But this was overruled in

**Andrews v. Gas Meter Co., [1897] 1 Ch. 361.**

The Memorandum provided that the capital of the company should be £60,000 divided into 600 shares of £100 each. Power was given to increase the capital, but there was no power in the Memorandum or Articles to issue preference shares. The company, by special resolution, altered its Articles so as to give itself power to issue preference shares, and issued them:—**Held**, the issue was good. If this had been **forbidden** by the Memorandum it could not be done: but if not, it is immaterial that the change quite alters the composition of the company.

And (3). **They do not impose a fraud on the minority.**

Thus, if there were 1000 shares of £1 each, ranking equally as to dividend, a resolution that shares numbered 1 to 800 should bear three times as much dividend as the others, would be bad.

**Menier v. Hooper's Telegraph Works**  
(1874), L. R. 9 Ch. 350.

The majority of the members of Company A. were also members of Company B., and at a meeting of Company A. they passed a resolution to compromise an action against Company B. in a manner favourable to B. but unfavourable to A.:—**Held**, the minority of Company A. can have the compromise set aside (*e*).

The result appears to be that any change within the powers of the Memorandum will be allowed, subject to this limit, that the majority cannot alter the regulations so as to sacrifice the interests of the minority, without

(*e*) And see *Punt v. Symons & Co.*, [1903] 2 Ch. 506; and *Marshall's Valve Gear Co.*, [1909] 1 Ch. 267; and cf. *Neale v. City of Birmingham Tramways*, [1910] W. N. 175.

a reasonable prospect of advantage to the company as a whole (*f*).

But an arrangement which benefits the company may be allowed, even though it is unfair to individual shareholders.

**Allen v. Gold Reefs, Limited, [1900] 1 Ch. 656.**

The Articles gave the company a lien on all shares "not fully paid up," for calls due to the company. A. was the only holder of fully paid shares, he also owed money to the company for calls due on other shares. A. died. The company altered its Articles by striking out the words "not fully paid up," and thus gave itself a lien over all A.'s shares:—**Held**, this was good. The power must be exercised for the benefit of the company as a whole. "I can see no reason for judicially putting any other limit on the power": LINDLEY, M.R.

A company cannot deprive itself of its power to alter its regulations (*Andrews v. Gas Meter Co.*, see p. 48).

And it cannot by altering its articles justify a breach of contract with third parties.

*I.e.* a company cannot avoid its liabilities under a contract made with persons who are not members of the company by altering its Articles (*British Equitable Co. v. Baily*, [1906] A. C., at p. 36).

An alteration not made in the proper way is not complete, but may have some effect.

**Muirhead v. Forth Mutual Insurance Co., [1894] A. C. 72.**

An insurance company purported to alter its Articles by adding that every policy should contain a certain clause. The alteration was not properly made, but the new Article was indorsed on every policy, which was made "subject to the Articles":—**Held**, a policy holder was bound by the Article.

(*f*) Buckley, p. 25; Rawlins and Macnaghten, p. 266

The Memorandum and Articles are registered with the Registrar (*g*) at Somerset House, and may be inspected by **any one** on payment of a small fee (*h*); but only **members** of the company are entitled to have a copy. The company may charge 1s. for the copy (*i*).

The **result** of this publicity is that any one who deals with the company is deemed to have notice of the contents of the Memorandum and Articles, and therefore of the powers of the company and the directors; and if any one deals with the company in matters which are inconsistent with the powers so given, he must take the consequences.

But so long as the act done is not **inconsistent** with the Memorandum and Articles, **an outsider is not bound to inquire whether all the necessary steps have been taken**. That is, he is entitled to assume that the directors have acted properly.

This is called **the Rule in the *Royal British Bank v. Turquand* (1856), 6 E. & B. 327.**

The directors issued a bond to T.—they had power to issue bonds if **authorised by special resolution**. No resolution had been passed:—**Held**, T. could sue on the bond. He was entitled to assume that a resolution had been passed.

“Persons dealing with the company are bound to read the registered documents, and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of the internal proceedings.”

**Duck v. The Tower Galvanising Co., Limited,**  
[1901] 2 K. B. 314.

R., who had business assets of the value of £100, and debts of the same amount, formed his business into a company. R.

(*g*) Companies Act, s. 15.

(*h*) *Ibid.*, s. 243 (6).

(*i*) *Ibid.*, s 18.

continued to carry on the whole business of the company, and without any meeting issued debentures to D. for £500 under the seal of the company. The regulations gave power to issue debentures :—**Held**, D. was entitled to assume that the debentures were valid, and he thus had priority over the other creditors.

But if the person dealing with the company has notice of the irregularity, he is affected by it (*Howard v. Patent Ivory Co.* (1888), 38 Ch. D. 156, at pp. 170, 171).

## CHAPTER V.

### FORMATION OF A COMPANY.

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#### SECTION 1.

#### The Preliminary Contract.

VERY frequently a company is formed for the purpose of purchasing an existing business or property: then the promoters of the company are in this difficulty, they do not want to go to the expense of forming the company until they have a binding contract from the owner of the business (or vendor) to sell it to the company; but, on the other hand, the company cannot make a binding contract until it is incorporated.

Sometimes a preliminary contract is made between the vendor and some person who acts **as agent or trustee** for the company about to be formed.

The position of the agent is curious, because a person cannot act as an agent for another person who is not yet in existence; therefore—

(1) **The company**, when it comes into existence, is not bound by the contract.

**Re English & Colonial Produce Co.**, [1906] 2 Ch. 435.

A solicitor, on the instructions of persons who became the directors of the company, prepared the Memorandum and Articles before its formation:—**Held**, the company was not liable to pay



the solicitor's costs, although it had taken the benefit of his work (see the judgment of VAUGHAN WILLIAMS, L.J., at p. 441 (a)).

(2) The Company cannot sue the vendor on the contract.

**Natal Land Co. v. Pauline Colliery Syndicate, Limited,**  
[1904] A. C. 120.

The N. Company agreed with Mrs. C., as agent of the P. Syndicate before its formation, that the company would grant a lease of a mine to the syndicate. The syndicate was registered, and discovered a seam of coal. The company refused to carry out the contract:—**Held**, there was no binding contract between the company and the syndicate.

And (3) The agent remains personally liable on the contract, even if it is afterwards ratified by the company (*Kelner v. Baxter* (1866), L. R. 2 C. P. 174).

Hence it is usual to provide in the contract that

- (a) If the company adopts the agreement, the agent's liability shall cease; and
- (b) If the company does not adopt the agreement within (say) two months, either party may rescind the contract; so that the agent escapes liability in either event. Then, as soon as the company is incorporated, it enters into a **new agreement** with the vendor to carry out the terms of the preliminary agreement.

Such a new agreement may be implied by the acts of the company (see *Natal Land Co. v. Pauline Colliery Syndicate*, [1904] A. C., at p. 126).

(a) Expenses of registration cannot be recovered from the Company in the absence of an express or implied request on the part of the Company that they should be paid (*National Motor Mail Coach Co.*, [1908] 2 Ch. 515).

Note, that the agent could probably sue the vendor on the contract and recover damages, if he has suffered any.

As a consequence of these difficulties it is now becoming the more usual practice not to make any contract until the company has been incorporated.

## SECTION 2.

### Registration.

#### (a) New Companies.

Persons wishing to form a new company must produce to the Registrar of Companies

- (1) The Memorandum of association (*b*).
- (2) The Articles of association (*b*).
- (3) A list of the persons who have consented to become directors (*c*).
- (4) A statutory declaration that the requirements of the Act have been complied with (*cc*).

The proper stamp duties must be paid and the Registrar enters the name of the company on the register.

The company then comes into existence; but it cannot commence business until it has complied with section 87 of the Companies Act (see p. 65).

#### (b) Existing Companies.

Any company which existed before the Companies Act (1862) may be registered under the Companies Act (*d*), if it has seven members, except—

(*b*) Companies Act, s. 15.

(*cc*) Companies Act, s. 17 (2).

(*c*) Companies Act, s. 72 (2).

(*d*) Companies Act, s. 249.

- (1) an unregistered company after a winding up has commenced (*Hercules Insurance Co.* (1871), 11 Eq. 321);
- (2) companies (other than joint stock companies) in which the liability of members is limited by Act of Parliament.

Existing companies are not bound to register under the Act.

*Form.*

Such a registration can take place with the consent of a three-quarters majority of members present at the general meeting of the company (*e*), and the following information must be supplied to the Registrar:—

1. A list of members.
2. A copy of the charter or deed of settlement of the company.
3. The amount of the nominal capital.
4. The number of shares.
5. The name of the company, with the addition of the word “limited.”

SECTION 3.

**The Certificate of Incorporation.**

When the Memorandum has been signed and the fees paid, the registrar enters the name of the new company in the register, and hands over a certificate of incorporation in the following form:

“I hereby certify that Blank Company, Limited, is this day incorporated under the Companies (Consolidation) Act, 1908, and that the company is limited,”  
—Given under my hand at London this 4th day of February, 1910.

**The certificate is conclusive.**—By the Companies Act, 1862, s. 18, the certificate was declared to be conclusive evidence

(*e*) Companies Act, s. 249 (2).

that the Act had been complied with. But doubts arose on the construction of this section, and it was held that if it was legally impossible that the company could have been properly registered, the court could go behind the certificate, and hold that there never had been a company.

**National Debenture Co., [1891] 2 Ch. 505.**

**Held**, if only six members really signed the Memorandum, the certificate would not be conclusive.

This was doubted in *Ladies' Dress Association v. Pullbrook*, [1900] 2 Q. B. 381.

In order to avoid such doubts, section 18 was repealed and now the certificate is conclusive evidence that all the requirements of the Companies Act, in respect of **registration and of matters precedent and incidental** thereto have been complied with, and that the association is a company **authorised to be registered, and duly registered** under the Companies Act (*f*).

A company registered out of the United Kingdom (*g*) must file with the registrar

- (a) a copy of its charter or memorandum and articles ;
- (b) a list of directors ;
- (c) the name of a person on whom process may be served ;
- (d) an annual summary (see p. 86).

(*f*) Companies Act, s. 17, replacing s. 1 of the Act of 1900. See also *Re Walker & Smith, Limited* (1903), 88 L. T. 792, where an invalid reduction of capital was held valid because the registrar had certified it.

(*g*) Companies Act, s. 274.

## CHAPTER VI.

## THE PROMOTER AND THE PROSPECTUS.

## SECTION 1.

## The Promoter.

THE term “promoter” is not a term of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is brought into existence (*a*).

A **promoter** is “one who undertakes to form a company with reference to a given object, and to set it going, and who takes the necessary steps to accomplish that purpose” (*b*). He is not a trustee or agent for the company, for it has not yet come into existence; but he stands in a fiduciary relation towards it, just as if he were a trustee (*c*), and is liable to refund secret profits, etc., in the same way as a director.

If, therefore, the promoter wishes to sell his own property to the company, he should either (i.) see that there is a board of independent persons appointed as directors of the new company, or (ii.) he should disclose all the facts to the public by means of a prospectus.

(*a*) *Whaley Bridge Co. v. Green* (1879), 5 Q. B. D. 111.

(*b*) *Twycross v. Grant* (1877), 2 C. P. D. 541.

(*c*) *Rawlins and Macnaghten*, p. 238.

## SECTION 2.

**The Prospectus.**

A **prospectus** is usually a circular sent round by the promoters after the formation of the company to induce the public to take shares in the company. It is defined in the Companies Act as “any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company” (*d*).

The object of a promoter in issuing a prospectus is to make it as attractive as possible.

The object of the legislature is to prevent the public from being misled and defrauded.

The promoter must take great care—

1. **Not** to make any untrue statements, because—

- (a) an allotment of shares may be set aside for fraud or misrepresentation; and
- (b) he may be sued for damages for fraud; and
- (c) he may be sued for compensation for misrepresentations under section 84 of the Companies Act, which replaces the Directors' Liability Act, 1890.

2. **To disclose** all matters which he is bound to disclose by the Companies Act.

**As to 1. Untrue statements.** (a).—**Rescission for fraud or misrepresentation** (*e*).

**Fraud.**—A contract to take shares is governed by the same rules as other contracts, and therefore any

(*d*) Companies Act, s. 285, as to what is an issue to the public, see p. 209.

(*e*) See Rawlins and Macnaghten, p. 224.

person induced by fraud to take shares may rescind the contract, and have his name struck off the register. But he cannot both retain the shares and get damages (*Houldsworth v. Glasgow Bank* (1880), 5 App. Cas. 317).

**Misrepresentation.**—Any person who takes shares on the faith of statements contained in a prospectus may set aside the contract and apply to be struck off the register if those statements are false, even though they were made innocently.

But he must apply—

- (1) within a reasonable time; and
- (2) before proceedings to wind up the company have been commenced.

The misrepresentation need not be the **sole** reason which induced the applicant to apply for shares, if he really acted upon the misrepresentation (*Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459).

Statements of **opinion** or exaggerated views of the advantages of a company are not enough to upset a contract to take shares.

But if they are so gross that, taking the whole thing together, there was really a misrepresentation of fact, the contract may be set aside.

**Greenwood v. Leather Shod Wheel Co.**, [1900] 1 Ch. 421.

The prospectus stated in large type, “orders have already been received from the House of Commons,” and “wheels for the trolleys in the House of Commons have been ordered, and are now in use.”

In fact, the person who supplied refreshments to the House had one trolley with these wheels, but not ordered by the House of Commons:—**Held**, the prospectus was fraudulent and the contract void.

**Concealment** in a prospectus may amount to fraud, but only if it is such a concealment as implies a falsehood (*f*).

(b) **Damages for fraud.**

In *Derry v. Peek* (1889), 14 App. Cas. 337, it was held that a director was not liable in damages for false statements in a prospectus if he honestly believed them to be true, even though there was **no reasonable ground for his belief**; for the common law action of deceit will not lie unless "a man makes a statement to be acted upon by others, which is false, and which is **known by him to be false or is made by him recklessly** or without care whether it is true or false" (see p. 350 of the report). This still remains the law as to fraud or deceit; but after this decision directors and promoters were subjected to the special liability in respect of compensation mentioned below.

(c) **Compensation under section 84.**

A director is liable to compensate any person who is damaged by a false statement in a prospectus unless—

- (i.) he had reasonable grounds for believing it to be true; or
- (ii.) he made the statement upon the authority of an expert whom he had reasonable grounds for believing to be competent; or
- (iii.) the statement was a correct copy of an official document.

(*f*) See cases in Rawlins and Macnaghten, p. 224, and in Buckley, pp. 91 and 92.



**As to 2.—Matters which must be disclosed.**

These are now contained in the Companies Act, s. 81.

The abuses intended to be remedied by the legislature were—

1. Material facts were frequently suppressed.
2. The directors often had no stake at all in the company.

3. Many companies proceeded to business, even if only a few of the shares had been taken up and the company failed for want of sufficient capital.

4. Much of the money subscribed went to pay purchase money inflated by profits of some syndicate who sold the property to the promoters.

The legislature has attempted to remedy these abuses by the following provisions:—

If the company issues a prospectus, then the prospectus must be dated, a copy must be signed by every director or proposed director (*g*), and filed with the registrar, and the prospectus must state on the face of it that a copy has been so filed.

**The prospectus must state (*h*)—**

- \*(a) The contents of the Memorandum, with the names, descriptions, and addresses of the signatories, and the number of “founders” or deferred shares (if any).
- \*(b) The number of shares (if any) fixed by the Articles as the qualification of a director and the remuneration of the directors.
- \*(c) Names, descriptions, and addresses of directors.
- (d) The minimum subscription on which the directors may proceed to allotment (see p. 65).

(*g*) S. 80. Penalty, £5 per day.

(*h*) S. 81.

- (c) The number of shares or debentures issued as fully or partly paid up otherwise than in cash.
- (f) The names and addresses of the vendors and the amount payable to each.
- (g) The amount of the purchase money, specifying the amount paid for goodwill.
- (h) The amount of the underwriting commission (if any). (See p. 171.)
- \*(i) An estimate of the preliminary expenses.
- (j) The amount paid to any promoter, and the consideration for such payment.
- (k) The date of and parties to any material contract and a reasonable place where it may be inspected; but not if made—
  - (1) in the ordinary course of the company's business; or
  - (2) more than two years before the issue of the prospectus.
- (l) Names and addresses of the auditors (if any).
- \*(m) The interest of every director or promoter in the promotion of or the property to be acquired by the company, and any sums paid to him to induce him to become or to qualify him as a director.
- (n) Where the shares are of more than one class, the rights of voting attached to the several classes of shares.

The requirements of this section are set out in full in the appendix.

\*If a prospectus is issued more than one year after the company is entitled to commence business, then—

- (1) none of the provisions marked \* above apply; and
- (2) contracts made more than two years before the prospectus need not be disclosed.

Any condition binding the applicant to waive the provisions of this section is void.

B. Where no prospectus is issued.

By section 82 of the Companies Act the company must file with the registrar a "*statement in lieu of prospectus*" containing most of the information which would be required in the prospectus. (See the Second Schedule to the Companies Act set out in the Appendix.)

A director is not liable if—

- (1) he did not know of the matter not disclosed ; or
- (2) the non-compliance arose from an honest mistake of fact on his part. Otherwise he is probably guilty of a misdemeanour, and liable in damages to the members of the company.

The effect of the disclosures required by the Act is shortly as follows :—

(a) *The Contents of the Memorandum.* This shows the objects of the company and the amount of capital.

(b) *The qualification of the Directors.*

This shows how far the directors are prepared to put faith in the company themselves.

It is usual to provide that no person shall be qualified to act as director unless he holds a certain number of shares. (See Art. 84 in the Form on p. 40.)

These sections do not make it **necessary** for the company to fix any such qualification ; but if there is none, any person reading the prospectus can see that the directors have no personal interest at all in the success of the company.

By s. 72.—**A person cannot be appointed a director of the company by its articles or named as such in the prospectus unless he has**

- (1) signed a consent to act, and

- (2) signed the Memorandum for his qualification shares or a contract to take such shares **from the company** (*i.e.*, not as a present from the promoters).

This applies only to companies which invite the public to take shares, and probably does not apply to a prospectus sent to existing shareholders or debenture holders only (*Burrows v. Matabele Gold Co.*, [1901] 2 Ch. p. 27).

The result of non-compliance is not stated in the Act. Probably the appointment is void, and the person responsible has committed a misdemeanour and is liable in damages (*i*).

By s. 73.—**A director must take up his qualification shares within two months**; and if he ceases to hold them, he vacates office.

#### (d) The Minimum Subscription.

The directors or promoters must determine beforehand what is the minimum amount of capital with which they can successfully carry on the business of the company. This is called the “**minimum subscription**.”

**The amount (*k*) of the minimum subscription must be stated in the prospectus (*l*) or in the statement in lieu of prospectus.**

A business cannot as a rule be successfully worked without a certain amount of capital, and if a company starts with insufficient capital it is almost sure to meet with failure. Notwithstanding this, promoters of companies who had failed to obtain the necessary capital from the public, frequently persisted in the formation of the company, and thus caused almost inevitable loss to the persons who had subscribed for shares.

(i) Buckley, p. 767, and Rawlins and Macnaghten, p. 203.

(k) “10 per cent. of the shares offered” is a sufficient statement of the amount (*West Yorkshire Darracq Co.*, [1908] W. N. 236).

(l) The prospectus is for the purpose the particular prospectus on which the applicant relies (*Roussell v. Burnham*, [1909] 1 Ch. 127).

By s. 85.—No shares offered to the public are to be allotted until the “minimum subscription” has been subscribed and the amount due on allotment (which must not be less than five per cent. of the value of each share) has been **paid in cash**. The company need not fix any minimum subscription: but if it does not, or if none is stated in the prospectus, or in the statement in lieu of prospectus, **the whole capital** must be subscribed before any shares are allotted.

On any allotment of shares after the first allotment of shares offered to the public, the amount paid on allotment must not be less than five per cent., but the rest of this section does not apply.

This section does not apply to the allotment of debentures.

Any clause in the prospectus waiving the provisions of this section is void (*m*).

The amounts due on allotment must be paid in cash.

**Mears v. Western Canada Pulp Co.**, [1905] 2 Ch. 353.

Directors allotted shares when the exact amount of the minimum subscription had been subscribed and the amounts due on application had been paid by **cheques**; some of the cheques were not paid :—**Held**, the allotment was bad.

By s. 87.—The company cannot commence business until (a) the amount of the minimum subscription has been subscribed (*n*), (b) every director has paid on every share which he is liable to pay for in cash, the same amount as members of the public must pay on application and allotment, (c) a statutory declaration has been made to this effect, and (d) if there is no prospectus, a statement in lieu of prospectus has been filed.

Contracts made by the company before it has become

(*m*) S. 85 (5).

(*n*) Penalty £50 per diem.

entitled to commence business are provisional only, and do not become binding **on the Company** (*o*) until it has become entitled to do so.

This includes preliminary contracts which have been adopted by the company; and probably even the contract of the signatories of the Memorandum to take shares in the company is void if the company never obtains the minimum subscription (*Re Otto Electrical Co.*, [1906] 2 Ch. 390).

**(e) Shares and debentures issued for a consideration other than cash** (see p. 81).

**(f) The names of the vendors and the amounts payable to them.**

The purchase money paid to each vendor must be disclosed in the prospectus whether he sells directly to the company or sells to other persons who sell to the company. In the latter case the purchase money paid to each vendor must be shown.

A person is a vendor under this section if he has entered into any contract, absolute or conditional, to sell or buy or for an option to buy any property to be acquired by the Company, and

(*a*) the purchase money is not fully paid when the prospectus is issued;

or (*b*) the purchase money is payable wholly or partly out of the proceeds of the issue of shares offered by the prospectus;

or (*c*) the contract depends on the result of that issue (*p*).

(*o*) S. 87 (3). These words seem to imply that the contract is binding on the parties other than the company.

(*p*) S. 81 (2).

**Brooks v. Hansen, [1906] 2 Ch. 129.**

In May, 1901, Wheeler agreed to sell certain patent rights to a syndicate for £15,000. This sum was paid to Wheeler before the end of May. On June 1st, 1901, the syndicate agreed to sell the patents to a company for £58,500, and the company issued a prospectus on the same day which did not refer to the contract between Wheeler and the syndicate:—**Held**, Wheeler was not a vendor, and this contract need not be set out.

**Held also**, that if the £15,000 had not been paid to Wheeler before June 1st, 1901, and the company had agreed to buy from the syndicate the **benefit of its contract** with Wheeler, then Wheeler would have been a vendor. The test seems to be whether any of the cash paid by the company is paid to the original vendor or not.

(g) The amount of the purchase money specifying the amount paid for goodwill.

It is very difficult to determine the value of the goodwill of a business, and large sums are often paid for goodwill which are soon afterwards written off as having been entirely lost.

(h) Underwriting Commission (see Chapter XIII.).

(i) An estimate of the preliminary expenses.

These expenses include the stamps payable on the formation of the company, legal costs and other expenses connected with the preparation of the Memorandum and Articles and other documents and advertising the prospectus.

(j) The amount paid to any promoter as to promoters, see p. 57.

(k) The dates of and parties to every material contract.

A somewhat similar provision was contained in the Companies Act, 1867, s. 38, and was interpreted to include all contracts which imposed any obligation on the company, or which were entered into by promoters (or persons who afterwards became promoters) relating

to the affairs of the company, and which were material for an intending shareholder to know.

**Gluckstein v. Barnes**, [1900] A. C. 240.

The old "Olympia Co." was in difficulties, and the debentures were worth very little. X. Y. and Z., as trustees for a syndicate, bought up a great number of debentures very cheap. Then they bought "Olympia" for £140,000, and sold to a new company for £180,000. The result of this was, that the debentures were paid in full out of the £140,000, and X. Y. and Z. made a profit on the debentures of £20,000.

X. Y. and Z. became directors of the new company. They disclosed their profit of £40,000, but not their profit of £20,000 :—**Held**, there was not sufficient disclosure, and X. Y. Z. must pay the £20,000 to the company.

If any contract required to be disclosed by the Act of 1867, or by the Act of 1908 (*q*), is not disclosed, any person who has taken shares on the faith of the prospectus can claim damages from the directors who issued it; but only if he can show—

- (1) that the undisclosed contract was a material one; and
- (2) that he has suffered damage by its non-disclosure (*r*).

**(l) The names and addresses of the auditors.**

It is the business of the auditors to check the accounts of the company and report to the shareholders (see p. 204, *post*); it is therefore important that they should be reliable persons.

**(m) The interest of every director in the promotion**

(*q*) *Re Wimbledon Olympia, Limited*, [1910] 1 Ch. 630.

(*r*) *Nash v. Calthorpe*, [1905] 2 Ch. p. 237. And see *Macleay v. Tait*, [1906] A. C. 24; and *Marshall v. Morrison*, [1907] W. N. 29.



of or in the property proposed to be acquired by the Company.

If the director is a member of a firm, any such\*interest acquired by the firm must be disclosed.

Any sums paid to a director to induce him to become a director or to qualify him to act as director must also be stated.

### (n) Rights of voting at meetings.

If the shares are all of one class, the voting rights need not be disclosed.

The provisions of some of the earlier Acts were often made useless by a clause in the prospectus that applicants should waive the provisions of the section.

This “**waiver clause**” had to be straightforward and clear. If so, it was good and effectual to cover *bonâ fide* slips (s). If it was “tricky” it was void.

**Greenwood v. Leather Shod Wheel Co.**, [1906] 1 Ch. 421.

The same prospectus as is mentioned on p. 59, contained the clause: “There may be contracts which perhaps ought to be referred to” . . . “any subscriber shall be deemed to have waived all rights to further particulars of these contracts”:—**Held**, “the waiver clause is clearly tricky and fraudulent. It is printed in small type so as to escape attention. It is worded so as to conceal and not to afford notice of the contract of December 3rd to which the promoter was a party.” The clause was void (t).

All such waiver clauses in prospectuses issued after 1901 are now void (u).

An “**abridged prospectus**” is sometimes advertised in newspapers. Such a prospectus does not as a rule contain many of the

(s) *Macleay v. Tait*, *ubi sup.*

(t) And see *Watts v. Bucknall*, [1903] 1 Ch. 766.

(u) Sect. 81 (4).

disclosures required by the Act. Those who issue the prospectus attempt to protect themselves by stating that the prospectus is not an invitation to subscribe for shares, but an invitation to the public to apply for prospectuses, and the form of application attached to the advertisement is usually a form by which the applicant applies for a full prospectus.

It is probable, however, that such an "abridged prospectus" is really a "prospectus" within the meaning of the Act, and the provisions so elaborately framed are probably void as waiver clauses under section 81 (4).

This view is strengthened by the provisions of section 81 (5), which provides that if a prospectus is published as an advertisement, the contents of the Memorandum need not be set out. This seems to imply that all the other requirements of the section must be complied with.

If, therefore, the applicant reads and relies upon the abridged prospectus and does not read the full prospectus, there would be a considerable risk of his being able to obtain rescission of his contract (x).

Companies sometimes evaded these provisions by being registered outside the United Kingdom.

Any such company must now, if it has a place of business within the United Kingdom, file with the registrar a copy of its charter or Memorandum and Articles, a list of its directors, and the other matters set out in section 274 of the Companies Act.

Any company incorporated in a British possession which has filed these particulars may now hold lands in the same way as a company incorporated in England notwithstanding the Statutes of Mortmain (y).

The form given below is a form of prospectus actually used by an existing company (with some modifications and omissions). The student should read this form and ascertain whether, and, if so, how, the provisions of the Act have been complied with.

(x) *Roussell v. Burnham*, [1909], 1 Ch. 127.

(y) Companies Act, s. 275.

### Form of Prospectus.

*A copy of this prospectus has been filed with the Registrar of Companies.*

#### BLANK COMPANY, LIMITED.

(Incorporated under the Companies (Consolidation) Act, 1908.)

Capital - - - - £140,000

Divided into

14,000 6 per cent. cumulative preference shares of £5	£
each ... ..	70,000
14,000 ordinary shares of £5 each ... ..	70,000

Issue of

12,000 6 per cent. cumulative preference shares of £5	
each ... ..	60,000
10,500 ordinary shares of £5 each ... ..	52,500
	<hr/>
	£112,500

To be paid up as follows :

£ s. d.

1 0 0 per share on application.

1 0 0 „ „ allotment.

and the rest in calls as required.

(Or the whole amount may be paid on application.)

The preference shares are entitled to a preference as to capital and dividend over the ordinary shares. It is intended to pay dividends thereon half-yearly on June 15th and December 15th.

*Directors :*

A. Smith, of	, Director of Companies.
J. G. B., of	, Brewer.
R. C., of	, Brewer.

*Solicitors :*

G. F. & Co.

*Bankers :*

C. &amp; C. Bank.

*Auditors :*

G. H. &amp; Co., of

*Secretary and Offices :*

J. King,

Fleet Street, E.C.

## PROSPECTUS.

This company has been formed to acquire, as from July 6th, 1909, the whole of the business of Jones & Sons, established upwards of 100 years.

The property acquired by the new company comprises :

- (a) The freehold brewery and maltings known as Blank Brewery.
- (b) Ninety-nine freehold licensed houses.
- (c) Ten leasehold licensed houses.
- (d) Dwelling-houses, shops, cottages, stabling, and valuable land.

The brewery premises cover a large area, and are in good and substantial repair. There are two good maltings of 90 and 30 quarters capacity respectively. The plant is equal to 30 quarters. The brewery is well found in loose and moveable stocks, casks, drays, and other appliances.

The books and accounts of Jones & Sons show the profits to have been as follows :

			£	s.	d.
For the year ending October, 1906	...	...	17,402	18	11
" "	1907	...	15,668	2	0
" "	1908	...	16,714	7	0

(Or an average of £16,595 3s. 2d.)

The purchase price of the properties to be acquired, including the two properties mentioned, has been fixed by the vendors, Messrs. B. and L., of , at £211,591 5s. 6d., payable as to £100,000 by the allotment of first mortgage debenture stock of that amount, and the balance in cash. The

price for the loans, stocks, book debts, casks, horses, drays, etc., has been fixed by valuation at £9504 3s. 5d. The properties acquired have been examined and reported upon for the purposes of this purchase by Mr. A. Smith, managing director of the Thames Brewery Co., Limited, and a director of this company, as being of a value in excess of the purchase consideration, apart from any goodwill attaching to the brewery. No part of the purchase price is, therefore, paid in respect of goodwill.

The properties are sold to this company by Messrs. B. and I., of \_\_\_\_\_, who recently purchased them from Jones & Sons, Limited, for the sum of £202,591 5s. 6d.

The company will pay all the preliminary expenses relating to the formation of the company, the issue of this prospectus, the preparation of the contracts hereafter mentioned, the registration of the company, and the fee of Mr. A. Smith, one of the directors, for his services in negotiating the purchase and reporting upon the properties amounting to £1000.

The whole of such preliminary expenses are estimated to amount to £3000.

The following contracts have been entered into :

1. Dated August 20th, 1906, between Thomas Jones of \_\_\_\_\_, on behalf of Jones & Sons, Limited, of the one part, and J. G. B. and A. W. I. of the other part.

2. Dated September 16th, 1906, between the said B and I. of the one part, and this company of the other part.

There is also a verbal contract made in or about the month of July, 1906, between the said Messrs. B. and I. and the said A. Smith for payment to him of the fee above mentioned.

Mr. J. G. B. is interested in the sale as partner in the firm of B. and I.; Mr. A. Smith is interested to the extent of the receipt of the fee above mentioned.

The articles of association provide as follows :

The qualification of every director shall be the holding in his own right of shares in the company of £500 nominal value.

The directors respectively shall be entitled to be repaid out of the funds of the company all personal expenses incurred in or about the business of the company, and in addition thereto, each of the first directors (other than the managing director) shall be paid for his remuneration out of the funds of the company at the rate of £100 per annum.

The minimum subscription of shares upon which the company

will proceed to allotment is £20,000, but the whole of the present issue has been underwritten by Messrs. B. and I. in consideration of a sum of £6000, part of the sum of £211,591 5s. 6d. payable to them by the company as above mentioned.

On a show of hands each member present in person shall have one vote, and on a poll each member present in person or by proxy shall have one vote for each ordinary share held by him, and one vote for every five preference shares held by him.

A copy of this company's memorandum of association will be found printed in the fold of this prospectus, and forms part thereof.

Copies of the above-mentioned contracts, auditor's certificate, and the memorandum and articles of association can be seen at the offices of the solicitors to the company before the closing of the list of applications.

The company will pay a brokerage of one-half per cent. on all allotments made in respect of applications bearing brokers' stamps. Application for a settlement and quotation for this issue of preference and ordinary shares will be made in due course.

If no allotment is made, the deposit will be returned in full by post, and where the amount allotted is less than that applied for the available balance will be appropriated for the payment due on allotment, and any excess returned by post to the applicant.

Prospectuses and forms of application may be obtained at the offices of the company, or from the solicitors, bankers, brokers, and auditors.

*September 16th, 1909.*

(One copy is signed by all the directors.)

#### MEMORANDUM OF ASSOCIATION OF BLANK COMPANY LIMITED.

Here follows the form of Memorandum of Association set out on p. 13.

## CHAPTER VII. MEMBERS OR SHAREHOLDERS.

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### SECTION 1.

#### How Persons may become Members.

PERSONS may become members of a company in any of the following ways :

(1) Persons who sign the Memorandum are **deemed** to have agreed to be members, and **on the registration of the company** must be put on the register of members (*a*).

(2) Persons who have agreed to become members, either—

(a) by applying for an allotment of shares, or

(b) by taking a transfer from a member,

become members **when entered on the register of members.**

(3) A person who acts as director is sometimes deemed to have agreed to take his qualification shares (*Salton v. New Beeston Co.*, [1899] 1 Ch. 775).

**As to 1.**—Neither allotment nor registration is necessary to make a subscriber to the Memorandum a member of the company.

Every subscriber to the Memorandum must take the shares for which he subscribed, **and pay for them**, and

(*a*) Company's Act, s. 24.

he is only excused if **all** the shares have already been taken (*Tuffnell's Case* (1883), 29 Ch. D. 421).

If the company never becomes entitled to commence business, he can probably get his money back on the ground that the contract is void (*b*).

He must take them **from the company**:—(otherwise the first subscriber might take his one share and transfer it to the second, and so on), for **the same shares cannot be made to do double duty** (*c*).

This rule occasionally led to hardship before the Act of 1900; for a vendor who agreed to take shares as part of the purchase-money, and in ignorance signed the Memorandum for those shares, found himself bound to take them twice over. **Re Timmins, Limited**, [1901] W. N. 238. But this decision depended on section 25 of the Companies Act, 1867, which is now repealed by the Companies Act, 1900. Even now it is safer to provide expressly in the Articles that the shares to be allotted in payment of the purchase-money are the same as those in respect of which the Memorandum is signed, and it is better to avoid the question by the vendor not signing the Memorandum at all, or by his signing for one share only.

**As to 2.**—A person who agrees to become a member (*d*), does not become a member until his name is put on the register. But he is entitled to specific performance of the company's agreement to make him a member. The register is only *prima facie* evidence; thus, if a person who has agreed to become a member is not put on the register the court may rectify the register on the winding up of the company (*Arnot's Case* (1887), 36 Ch. D. 702, at p. 707); and a person who is wrongfully removed from the register, remains

(*b*) See *Re Otto Electrical Co.*, [1906] 2 Ch. 390.

(*c*) Buckley, p. 52.

(*d*) For rules as to a contract to take shares, see p. 90.



a member (*Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77): and if a person who has not agreed to take shares is put on the register, he is not a member (*Ormerod's Case*, [1894] 2 Ch. 475); and if he has been induced to take the shares by misrepresentation the register can be rectified (*c*).

## SECTION 2.

### Who may become a Member.

(1) **A company** may become a member of another company, if it is authorised by its Memorandum to take shares, or if it takes the shares in payment of a debt by way of compromise (*f*) (*Lands Allotment Co.*, [1894] 1 Ch. 616, at p. 630).

But a company cannot acquire its own shares and become a member of itself, even if expressly authorised so to do by its Memorandum (*g*).

(2) **An infant** may take shares, subject to a right to repudiate them on attaining full age.

*Hamilton v. Vaughan Sherrin Co.*, [1894] 3 Ch. 589.

Miss H. (aged eighteen), applied for twenty £5 shares, and paid £1 each on allotment. No dividends were paid. Six weeks later she repudiated the shares:—**Held**, she could repudiate all further liability as she had taken no benefit under the contract.

(3) **A married woman** even before 1882 could hold shares as her separate estate. If she held them otherwise, her husband was liable for calls.

(*e*) Such an application was made by the company itself, *Re London Electrobuss Co.*, [1906] W. N. 149, and was made *ex parte* with a view to avoiding the expense of adding numerous shareholders as parties.

(*f*) Buckley, p. 8, and see Companies Act, s. 68, as to the way in which such a company can vote.

(*g*) *Trevor v. Whitworth* (1887), 12 A. C. 409.

Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a company may (if its Articles so provide) refuse to register a married woman as a member, if there is any liability on the shares.

(4) **A person who lends money to the company on a mortgage of its shares**, becomes liable as a member in respect of those shares.

**Addison's Case** (1870), 5 Ch. Ap. 294.

A. lent the company £500 by taking 100 £5 shares and paying for them, with an agreement that the money was to be paid back on one month's notice. A. gave the notice, and the company re-paid the £500. A. transferred the shares to a **nominee of the company**:—**Held**, the company had no power to take back its own shares. A. was liable to pay £500 in respect of them.

(5) **A person who takes shares in the name of a fictitious person**, becomes liable as a member.

**Re Klondyke Gold Co.**, W. N. (1899), 1, 2.

S. carried on business under an assumed name; he took shares in that name and became bankrupt. His trustee tried to avoid liability as a shareholder:—**Held**, S. was liable.

### **Persons who do not become Members.**

A person who agrees to **place** shares does not thereby agree to **take** shares, and therefore does not become a member.

**Gorissen's Case**, (1873) L. R. 8 Ch. 507.

G. agreed that he would "place" 1000 shares for the company in consideration of being appointed its agent. The company registered G. as a holder of 1000 shares:—**Held**, G. was not a shareholder; he had not agreed to **take** shares, but only to find other persons who would take them.

A trustee with power of sale cannot sell the trust property for shares.

*Re Morrison*, [1901] 1 Ch. 701.

A testator gave all his property to trustees on trust to sell and invest in the ordinary trustee investments. He had an iron business. The trustees wished to turn the business into a company by selling it to a company in return for shares:—**Held**, the trustees had no power to do this, and the court had no power to sanction it.

But where trustees were authorised to hold shares in a particular company, and that company was wound up and its business transferred to another company as part of a reconstruction scheme, the court allowed the trustees to hold the corresponding shares in the new company (*Re New*, [1901] 2 Ch. 534).

A person may cease to be a member by—

- (1) transfer (but he remains liable to be put on the “B. list” for one year, see p. 82)
- (2) forfeiture (see p. 109);
- (3) sale by the company under its lien (see p. 113);
- (4) death (the shares are transmitted to his personal representatives);
- (5) winding-up of the company.

### SECTION 3.

#### Liability of Members.

##### (1) Apart from express agreement.

A shareholder must pay the whole nominal amount of his share **in cash**. Otherwise he will be liable for the amount unpaid on the winding-up of the company.

“**Cash**” means “such a transaction as would, in an action at law for calls, support a plea of payment.”

Thus, if the company owes A. £100, and A. then agrees to take 100 £1 shares in satisfaction of the

debt, the shares are fully paid up in **cash**. It is not necessary for A. to pay a cheque for £100 to the company, and for the company to hand it back to A.

**Larocque v. Beauchemin**, [1897] A. C. 358.

The company agreed to buy a paper mill for \$35,000 in cash. The vendors then agreed to take 50,000 shares in the company, and paid for some of them in cash, but the rest were paid for by the company retaining part of the \$35,000 which they owed the vendors. (NOTE.—This was not an agreement to sell for **shares**, but to sell for **cash**, and a later independent agreement to take shares):—**Held**, the whole 50,000 shares had been paid for in cash. Lord MACNAGHTEN: “If a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money **at once** for the purchase of the property, and on the other side a *bonâ fide* liability to pay money **at once** on shares, so that, if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it appears to me that the Act does not make it necessary that the formality should be gone through of the money being handed over and taken back again.”

The most important result of this rule is the further rule that **shares cannot be issued at a discount**, *i.e.* a company cannot issue a £100 share with an agreement that only £75 shall be paid.

**Ooregum Gold Co. v. Roper**, [1892] A. C. 125.

The company was in difficulties. Its £1 shares stood at 2s. 6d. The directors issued 120,000 £1 shares with 15s. credited paid up, so that only 5s. was payable on each share:—**Held**, this would have been illegal, even if the Memorandum had expressly authorised it.

Shares must not be issued at a discount even by way of compromise (*Mother Lode Gold Mines v. Hill* (1903), 19 T. L. R. 341), nor in any other indirect way (*h*).

(*h*) Cf. *Bury v. Famatina Development Corporation*, [1909] 1 Ch. 754.

**Mosely v. Koffyfontein Mines, [1904] 2 Ch. 108.**

The company proposed to issue debentures at a discount of 20 per cent. (*i.e.* to borrow money and to become liable to re-pay £100 for every £80 lent). Every holder of a debenture was to have the right to surrender every £1 worth of his debentures in return for a fully paid £1 share:—**Held**, this arrangement was not legal, as the result would be that a holder might get 100 £1 shares for £80.

This rule was not altered by the Companies Act, 1900, s. 8 (*g*), which, although wide in its terms, only allows underwriting commission under certain restrictions, see p. 172.

(2) **Agreements to allot shares for a consideration other than cash.**—Shares may be issued as fully paid up **in return for services**. The company must register with the registrar **within one month**, a contract in writing (or particulars of the contract if it is not in writing (*h*)) showing the title of the shareholder and the consideration that he gave for the shares (*i*).

By an Act of 1867 (*j*), the contract had to be registered **at once**, and if default was made, the shareholder was liable to pay for the shares in full.

Under the present Act, if default is made, the directors are subject to penalties, but the liability of the shareholder is not affected.

This is not an exception to the rule that shares must be fully paid up, but only to the rule that they must be paid **in cash**.

(*g*) Now s. 89 of the Companies Act.

(*h*) S. 88 (2) of the Companies Act.

(*i*) S. 88 of the Companies Act.

(*j*) 30 & 31 Vict. c. 131, s. 25.

If the proper contract is filed, the court will not inquire into the adequacy of the consideration.

**Re Wragg, Limited**, [1897] 1 Ch. 796.

The vendors sold an omnibus business to the company for £46,000, of which £20,000 was to be paid in fully paid shares. The proper contract was filed. Evidence was given that the business was not worth anything like that amount:—**Held**, if there is fraud, the contract can be set aside; but apart from that, if a contract is filed, the court will not go into the adequacy of the consideration (*k*).

A shareholder who transfers his shares remains liable to a certain extent; for on a winding-up two lists are made,

The “A” list or list of present members; and

The “B” list or list of persons who have ceased to be members within one year before the winding up.

Any person on the “B” list is liable to the extent of the amounts unpaid on his shares if—

- (1) on the winding-up debts exist which were incurred while he was a member; and
- (2) the members on the “A” list cannot satisfy the contributions required from them (*l*).

(The position of persons on the “B” list is fully explained in *Helbert v. Banner* (1871), L. R. 5 H. L., at p. 34.)

(*k*) And see *Mosely v. Koffyfontein Mines*, [1904] 2 Ch. at p. 116.

(*l*) Buckley, p. 286 *et seq.*

## SECTION 4.

## Register of Members.

The register contains the name and address of each member, the amount and numbers of his shares, the date of acquiring them, and the amount paid up.

It is open to members gratis, and to non-members on payment of 1s. (*m*) and any person may demand a copy at 6d. per 100 words, but he may not make extracts *Balaghat Co.*, [1901] 2 K. B. 665; overruling *Boord v. African Co.*, W. N. (1897) 174 (*n*).

Thus it is possible for any person who wishes to deal with the company to know who are the members, and for how much each is liable. It is generally safe to rely on the register, for although it is not conclusive, it is *primâ facie* (*o*) proof that the person on the register is the person liable. Thus, if a person allows himself to be on the register without objecting, he may be held liable; but if he was induced to become a member through fraud, and did not discover the fraud until the winding-up, he will not be liable.

**Baillie's Case**, [1898] 1 Ch. 110.

B. wished to join an old society called the "Auctioneers Institute of the United Kingdom." A new society, "The Institute of Auctioneers and Valuers," persuaded him to join, pretending to be the old society:—**Held**, B. may be struck off the register.

**"No notice of any trust shall be entered on the register"** (*p*).—This means that the company need

(*m*) Companies Act, s. 30.

(*n*) The motives of the person requiring the copy appear to be immaterial: *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 248.

(*o*) See p. 76.

(*p*) Companies Act, s. 27.

not take any notice of a trust even if it has constructive notice that there is a trust.

**Simpson's v. Molson's Bank**, [1895] A. C. 270.

Trustees held shares in the bank under a will upon trust for S. The trustees transferred some of the shares to a person who was not entitled to them. A copy of the will was deposited in the bank, and the president of the bank was one of the executors of the will : but in spite of this the bank registered the transfer :—**Held**, the bank was not liable to S. (q).

But if the company deals with the shares itself (*e.g.* lends money on security of the shares) it will be bound by constructive notice in the same way as any other person dealing with the shares (*Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646).

It does not mean that there cannot be a trust of shares. If there is, the trustee's name is put on the register, and he is the shareholder, and is liable for calls, even though the calls exceed the value of the trust property in his hands.

The Trustee, however, is entitled to be indemnified by the beneficiary. Thus, though the company looks only to the person on the register, it is the beneficiary who is **ultimately** liable for the calls ; and possibly the company could sue the beneficiary direct (standing in the shoes of the trustee as to his indemnity).

The beneficiary (if he is *sui juris*) must indemnify the trustee for all calls paid even if they exceed the amount of the trust property.

(q) And see *Rearden v. Provincial Bank*, 1896, 1 I. R. 532.



**Hardoon v. Belilios**, [1901] A. C. 118.

A stockbroker took 500 shares in the name of his clerk. The broker received the dividends. The company called upon the clerk to pay £400 in calls. The clerk claimed that he was entitled to be indemnified by the broker; but the broker claimed that the indemnity must be limited to the value of the trust property (viz., the shares, which were valueless):—**Held**, the broker must indemnify the clerk by paying the whole £400 (*r*).

An **executor** of a shareholder is not personally liable to pay calls, unless he either—

- (1) applies to be put on the register; or
- (2) buys shares with money belonging to the testator's estate.

If he does, he is entitled to an indemnity from the estate.

If he does not, the estate is liable to the company for calls.

Thus the estate is ultimately liable in either case.

An executor is entitled to be put on the register on proof of his title, and the company is not entitled to qualify the entry of his name on the register, by showing that he holds the shares in a representative capacity (*s*).

Another result of the rule that trusts shall not be put on the register is that where there are several mortgages of the same shares, the mortgagee first in date has priority, not the first who gives notice to the company (*t*).

(*r*) But this does not apply to the trustees of a club where the understanding is that the members are not to be called upon to pay more than their subscriptions (*Wise v. Perpetual Trustees Co.*, [1903] A. C. 139).

(*s*) *Re T. H. Saunders & Co., Ltd.*, [1908] 1 Ch. 415.

(*t*) See *Société Generale v. Walker* (1885), 11 App. Cas. 20.

## SECTION 5.

**Annual List of Members.**

A company must make a list of its members and every year send it to the Registrar (*u*).

This list must contain the names, addresses, and occupation of all the members and the number of shares held by them, distinguishing between the shares issued for cash and those issued otherwise than for cash.

The list must also contain a summary called the “**Annual Summary.**”

This summary must specify and contain (*x*)—

- (1) The names and addresses of the present members and of past members who were members at the date of the last return.
- (2) The amount of capital and the shares into which it is divided.
- (3) The number of shares taken since the commencement of the company.
- (4) The amount of calls made on each share.
- (5) The total amount of calls received and calls unpaid and of shares forfeited.
- (6) The amount paid for underwriting shares and debentures since the last return.
- (7) The number of share warrants and the number of shares comprised in them.

(*u*) Companies Act, s. 26.—The list must be made within 14 days after the first ordinary general meeting of the company and sent to the Registrar within seven days. It must be signed by the manager or secretary.

(*x*) For the full list, see s. 26, in the Appendix.

- (8) A list of the directors.
- (9) The total amount of the debts secured by mortgages and charges.
- (10) A balance sheet showing capital, liabilities, and assets.

## CHAPTER VIII.

### SHARES.

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A SHARE is a right to receive a certain proportion of the profits of the company and of the capital of the company when it is wound up. The shares in a company are all numbered and the shares of each member are identified by these numbers.

#### SECTION 1.

##### Allotment.

Allotment is the appropriation to a person of a certain number of shares.

An **application** for shares is an **offer** to take shares ; **allotment** is the acceptance of that offer by the company.

The following is a form of application for shares :

No. .

##### Form of Application for Ordinary Shares.

BLANK COMPANY, LIMITED.

*(Incorporated under the Companies (Consolidation) Act, 1908).*

Issue of 10,500 Ordinary Shares of £5 each.

To the above named Company,  
Gentlemen,

Having paid to your bankers the sum of £ , being a deposit of £1 per share on of the above-mentioned ordinary shares, I (we) **request** you to allot to me (us) that number of

ordinary shares upon the terms of your prospectus, dated September 1st, 1909, and I (we) hereby agree to accept the same or any smaller number that may be allotted to me (us) and to pay the balance, if any, due on allotment as provided by the said prospectus, and I (we) **authorise you to place my (our) name on the register of members** in respect of the shares so to be allotted to me (us).

To be written distinctly.	{	Name in full (Rev., Mr., Mrs., or Miss)	.
		Address in full	.
		Occupation	.
		Usual signature	.
		Date	, 19 .

The allotment of shares is governed by the Companies Act, and subject to the provisions of the Act, by the common-law rules of contract.

By s. 85 of the Companies Act, 1908, no shares are to be allotted until the "minimum subscription" (*a*) has been subscribed and the amount due on application (which must not be less than five per cent. of the nominal amount of the shares) has been paid.

If the minimum subscription is not subscribed (*b*) within forty days after the issue of the prospectus, the money paid by subscribers must be returned within the next eight days. If not, the directors become liable to repay the money with interest at five per cent. from the end of the forty-eight days.

The effect of allotting shares before the minimum subscription has been subscribed is—

- (1) the allotment may be set aside within one month of the statutory meeting; and

(*a*) See p. 65.

(*b*) The application moneys are not considered to be duly paid until the cheques have been duly cleared (*National Motor Mail Co.*, [1908] 2 Ch. 228; *Mears v. West Canada Pulp Co.*, [1905] 2 Ch. 353, 360.

- (2) any director who has knowledge of the fact is liable to compensate the company or the members (c).

This section (except the provision as to the amount payable on application) does not apply to any allotment of shares after the first allotment of shares offered to the public.

A person to whom shares are allotted cannot safely deal with them until this section has been complied with, and the company has become entitled to commence business under s. 87 (see p. 65).

**Finance and Issue, Limited v. Canadian Produce Co., Limited, [1905] 1 Ch. 37.**

The company by mistake allotted 40,000 shares before the minimum subscription had been subscribed:—**Held**, the allottees have a right to rescind their allotments, but the company may give to every allottee an option to have the allotment cancelled and the money returned.

Subject to these provisions of the Companies Act the same rules apply to a contract to take shares as to any other contract. The application is the offer: the allotment is the acceptance.

Thus, an application may be withdrawn at any time before notice of allotment has been posted to the allottee, or reached him in any other way.

**Dunlop v. Higgins, (1848) 1 H. L. C. 381.**

The allotment letter was delayed in the post. The allottee repudiated:—**Held**, the contract was complete when the allotment letter was posted.

(c) Companies Act, s. 86; and see *Burton v. Bevan*, [1908] 2 Ch. 240, where a director who was not present at the meeting at which the Board determined to go to allotment, was held not to be liable.

**Household Insurance Co. v. Grant**, (1878), 4 Ex. D. 216.

The same result where the letter was **lost** in the post.

But if the company is bound to allot a certain number of shares to a certain person, the contract is complete so soon as the application is posted.

Thus, suppose on an issue of further capital, each holder of three old shares is entitled to two of the new shares (*i.e.*, two shares are offered to him on certain terms), the holder accepts the offer if he applies for the shares.

Notice of allotment is not necessary if the applicant states that he does not require notice.

If there is undue delay in the allotment, the offer lapses ;

**Ramsgate Hotel Co. v. Montefiore** (1866), L. R. 1 Ex. 109.

M. applied for shares June 28th. Shares allotted November 23rd. M. refused to take them :—**Held**, the offer had lapsed before acceptance.

Conditional applications may be made ;

**Roger's Case** (1868), 3 Ch. App. 633.

R. wanted to be appointed local manager of a company. He was told he would have to take 100 shares. He applied for the shares, but was not appointed. He refused to take them :—**Held**, the application was conditional on his being appointed local manager, and he might refuse.

There is no contract if the applicant thinks he is applying to a different company : at any rate, if he is induced to do so by fraud (*Baillie's Case*, [1898] 1 Ch. 110 : see p. 83).

Shares in a company are personal property, even

though the company owns land (*d*). There are, however, some exceptions, *e.g.* the New River Company, a share in which is real property (*e*).

## SECTION 2.

### Certificates.

A member of a company has a right to a certificate of his shares, which must be prepared and ready for delivery within two months after the shares have been allotted or a transfer registered (*f*).

The certificate is usually in the following form :

No. .

### Share Certificate.

BLANK, LIMITED.

THIS IS TO CERTIFY that Thomas Smith of (address) is the registered proprietor of one hundred ordinary shares of ten pounds each, numbered 2551 to 2650 both inclusive, in the above-named company, subject to the Memorandum and Articles thereof, and that up to this date there has been paid in respect of each such share the sum of five pounds.

Given under the common seal of the said company the 11th day of March, 1909.

JOHN JONES,                   {  
WILLIAM BROWN,        } Directors.

SAMUEL GREEN, Secretary.

**The object of a certificate** is to enable a shareholder on dealing with his shares to show at once a good *primâ facie* title.

It is therefore very difficult for a shareholder to deal with his shares without producing the certificate. Consequently, money is often lent to the shareholder,

(*d*) *Entwhistle v. Davis* (1867), L. R. 4 Eq. 272.

(*e*) And may be held by several persons as tenants in common (*Swayne v. Fawkener*, Showers, P. C. 298 (263)).

(*f*) Companies Act, s. 92.



the lender taking possession of the certificate by way of security.

**Loss of the certificate.**—The Articles usually provide that if a certificate is lost or destroyed the company will grant a new one, on satisfactory proof of the loss or destruction.

**The effect of a certificate.**—"A certificate is a statement that the company asserts that the person to whom it is granted is the registered shareholder entitled to the shares included in the certificate, and that the amount certified to be paid has been paid" (Buckley, p. 42).

The company may be liable in two ways:

### 1. Estoppel as to title.

If the company authorises the issue of a certificate stating that A. is the registered holder of certain shares, it cannot afterwards allege that A. is not entitled to those shares.

**Dixon v. Kennaway**, [1900] 1 Ch. 833.

Liddel was the secretary of a company and a stockbroker. Mrs. D. applied to L. for 300 shares in the company, and paid for them. Pitman (clerk to L.), who owned no shares, executed a transfer of 300 shares to Mrs. D.

The company, without requiring P.'s certificate to be produced, registered the transfer and gave Mrs. D. a new certificate:—**Held**, the company is estopped from denying the validity of Mrs. D.'s certificate and is liable to her in damages.

But if an officer of the company issues certificates without the authority of the company, there is no estoppel.

**Ruben v. Great Fingall Consolidated**, [1906] A. C. 439.

R. lent money to the secretary of the company on the security of a share certificate. The secretary signed his own name on the

certificate, affixed the seal of the company, and forged the names of two directors:—**Held**, the certificate was simply a forgery, and the company was not bound by it.

## 2. Estoppel as to payment.

If the certificate states that the shares are fully paid, the company cannot afterwards allege that they are not fully paid.

### **Bloomenthal v. Ford**, [1897] A. C. 156.

B., the stationer of the company, agreed to lend £1,000 to the company on the security of 10,000 fully paid shares. The company issued 10,000 shares to him with a certificate on which they were described as fully paid. In fact, nothing had been paid. The company was wound up, and B. was put on the list of contributories:—**Held**, the company and its liquidator were estopped from denying that the shares were fully paid, and B. could be removed from the list.

Such a statement in the certificate would not help a person who knew that the shares were not paid for in full in cash (*African Gold Co.*, [1899] 1 Ch. 414).

The certificate does not certify anything as to the equitable interest in the shares.

If a person who is not the registered holder of the shares obtains any rights over the share certificate (*e.g.* by a mortgage of or agreement to transfer the shares), it seems that the company is not under any duty to that person.

### **Rainford v. James Keith, Limited** [1905], 1 Ch. 296.

C., the registered holder of 120 shares, mortgaged them to R. by deposit of his certificate. Later, C. sold the same shares to Y., telling the company that a friend of his held the certificate, but not by way of security. The company registered Y. as the holder, and gave him a certificate:—**Held**, the company was negligent in accepting such an excuse from C. But **held**, the company was not liable for such negligence as it owed no duty to R. (although the certificate stated that no transfer would be registered without the production of the certificate).

NOTE.—There was no question of estoppel by certificate in this case, for the certificate simply stated that C. was the registered holder, which was true (*g*).

### SECTION 3.

#### Transfer.

A shareholder has power to transfer his shares by s. 22 of the Companies Act.

The form of transfer is generally governed by the Articles. See Arts. 30 and 31 on p. 34.

If there are no provisions in the Articles, the transfer must be in writing, signed by the transferor, as it is a transfer of a chose in action (*h*). But it need not be by deed.

A transfer is usually in the following form :

(Stamp, 10s.)

I, Thomas Smith (the transferor), of , in consideration of the sum of one hundred pounds paid by John Jones, of , hereinafter called the said transferee,

Do hereby bargain, sell, assign and transfer to the said transferee :

250 shares of £1 each, 15 shillings paid, numbered 404,201 to 404,450, both inclusive, of and in the undertaking called Blank, Limited.

To hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said transferee, do hereby agree to accept and take the said shares, subject to the conditions aforesaid.

As witness our hands and seals, this twelfth day of March, in the year of our Lord one thousand nine hundred and seven.

(*g*) This case was overruled on the facts. S. C., [1905] 2 Ch. 147; but the decision of the point of law was not upset; and see *Longman v. Bath Electric Trams*, 1905, 1 Ch. 646.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

Certificate for 250 £1 shares forwarded to the Company's Office by Thomas Smith. Signed [Secretary.]

Signed, sealed, and delivered, by the above-named Thomas Smith,  
in the presence of—

Witness's—

Signature, A. BAKER.

Address .

Occupation .

THOMAS SMITH (*Seal*).

Signed, sealed, and delivered, by the above-named John Jones  
in the presence of—

Witness's—

Signature, B. GREEN.

Address .

Occupation .

J. JONES (*Seal*).

The transfer is executed by the transferor, and handed to the transferee with the share certificate. The transferee executes it, and sends it to the company for registration. Until registration the transfer is not complete, but the transferee has a mere equitable interest. The company must register the transfer as soon as possible, having regard to any inquiries that may be necessary. If the officers of the company delay the registration unduly, the transferee may be given all the rights which he would have had if they had registered it within a proper time.

**Sussex Brick Co., [1904] 1 Ch. 598.**

Transferees of shares sent the transfer to the secretary. He replied that they would be submitted to the directors at the next board meeting. The company was wound up before the next meeting.

The liquidator refused to recognize the transferees as shareholders:—**Held**, the transferees must be registered "*nunc pro tunc*," i.e., as if they had been registered when the registration ought to have been made.

**Stamps.**—A transfer must be stamped 10s. if for a nominal consideration, but if for value it must be stamped *ad valorem* at the same rate as the conveyance of land under the Stamp Act, 1891 (*i.e.*, at the rate of 5s. for every £50 or part of £50, except that special rates are fixed for amounts below £300) (*i*).

Every shareholder has a right to transfer his shares, and the transfer will be good even if made to a man of straw, when the company is in difficulties, for the purpose of avoiding liability; provided that it is an absolute out-and-out transfer without any trust or reservation for the transferor (*De Pass' Case* (1859), 4 De. G. & J. 544; *Discoverers Finance Corporation, Ltd.* (No. 2), *Lindlar's Case*, [1910] 1 Ch. 207 and 312).

But this right may be restricted by the regulations (*j*). A power is usually given to directors to refuse a transfer if calls are in arrear; and a discretionary power may be given them even to refuse any transfer without assigning reasons (*k*). See Art. 32 on p. 34.

The court will not interfere with their discretion unless it can be shown that they did not act *bonâ fide*.

#### Re Coalport China Co., [1895] 2 Ch. 404.

By Article 3 of the company, "The directors may refuse to register any transfer . . . where they are of opinion that the proposed transferee is not a desirable person to admit to membership." The directors refused to register a certain transfer, and

(*i*) The stamp duty on a transfer on sale of shares has not been changed by the Finance Act, 1910 (19 Ed. VII. c. 8), see sect. 73. The *ad valorem* duty is, however, now chargeable on a voluntary transfer, except on an appointment of new trustees, or where no beneficial interest passes by the transfer (see s. 74 (6)).

(*j*) *Attorney-General v. Jameson*, 1904, 2 I. R. 644.

(*k*) This is not allowed by the Rules of the Stock Exchange, and should not be inserted if a quotation on the Stock Exchange is desired.

gave no reasons:—**Held**, in the absence of evidence that the directors had not acted *bonâ fide*, their refusal could not be questioned.

Sometimes the Articles provide that the other shareholders shall be given the right of first refusal of the shares before they can be transferred to outsiders. Similarly, an agreement, that on the bankruptcy of any member his shares shall be sold to certain persons at a certain price is good (*Borland v. Steel Bros.*, [1901] 1 Ch. 279. See p. 46).

The company cannot object to transmission on death or (subject to the last paragraph) on bankruptcy, even if calls remain unpaid.

Specific performance of a contract to transfer shares may be decreed, unless the directors (acting within their powers) refuse to register the transfer; then an action for damages will lie against the transferor.

**Mortgage of Shares.**—Shares are usually mortgaged by **depositing the share certificate** with the lender. Sometimes the borrower also executes a **blank transfer**: he fills up the transfer form but leaves the name of the transferee blank, and deposits the certificate and the transfer with the mortgagee. If the money is not paid within a reasonable time, the mortgagee may put in his own name as transferee and get the transfer registered, and thus secure a transfer of the shares, or he may sell the shares after giving reasonable notice (*l*).

**Deverges v. Sandeman**, [1902] 1 Ch. 579.

D. bought shares through his broker, but did not pay the purchase price (carried over). He gave a blank transfer to his broker as security. The broker asked for payment in July, 1897,

(*l*) Cf. *Stubbs v. Slater*, [1910] 1 Ch. at p. 639.

and after a long correspondence, the broker sold the shares in November, 1898 :—**Held**, the sale was good.

If the transferor prevents the purchaser from being registered as a shareholder, he is liable to pay damages if the shares afterwards fall in value (*Hooper v. Herts*, [1906] 1 Ch. 549).

If by the articles of the company a transfer of shares must be under seal, a blank transfer cannot be filled up without a power of attorney (*Powell v. London and Provincial Bank*, [1893] 2 Ch. 555). But the mortgagee may enforce the arrangement as an agreement to give him a legal transfer (*m*).

This form of mortgage of shares is not at all a good security : for, if the transferor fraudulently tells the company that he has lost his certificate, he can get a new one and transfer the same shares to a purchaser. It is no use to give an ordinary notice of the mortgage to the company, as the company is not bound to take notice of any trusts or equities affecting the shares.

**The only safe course is to give the company notice supported by affidavit under order 46, r. 4 (*n*).**

This is called “notice in lien of *distringas*” because it takes the place of the old writ of *distringas*. The mortgagee simply files an affidavit and a form of notice at the central office : he then serves an office copy of the affidavit and a duplicate of the notice on the company. The effect is that if the mortgagor attempts to transfer the shares, the company must give the mortgagee notice that it will register the transfer unless he takes proceedings within eight days to prevent it.

**Priorities as between several transferees.**—If none of the transfers are registered the first in point of time has priority (*Peat v. Clayton*, [1906] 1 Ch. 659).

(*m*) Buckley, p. 577.

(*n*) Rules of the Supreme Court.



But if a transferee, who is later in date, is the first to have himself registered as a member, he gets priority.

And this priority is not lost merely because there is some detail which remains to be done by the company before he is put on the register (*Moore v. North Western Bank*, [1891] 2 Ch. 599).

This detail must be something that the company is bound to do.

**Ireland v. Hart**, [1902] 1 Ch. 522.

I. held shares as trustee for his wife. Later he deposited with H. a blank transfer and the certificate, as security for his own debt. (Thus I.'s wife had the earlier equity.) H. filled up the transfer form and took it to the company for registration, but I. told the company not to register the transfer, and the company refused to do so:—**Held**, the wife was first in time, and therefore had priority, for the company were not bound to transfer to H. if they had any good reason for refusing.

**Certification of transfers.**—If a shareholder transfers part only of his shares, a new certificate will be required. Thus A. has one hundred shares and wishes to sell fifty to B. A. hands his certificate and transfer to the company. The company stamps on the transfer (before it is handed to B.) “certificate for 100 shares has been lodged at the company’s office (signed) \_\_\_\_\_, secretary” (see form on p. 95). The company is said to “certify the transfer.” The company then prepares two new certificates for fifty shares each and gives one to A. and one to B.

A delivery of a “certificated transfer” in this way is accepted by the Stock Exchange as a good delivery of the shares. The company does not, however, thereby guarantee A.’s right to the certificate, but merely intimates that documents apparently in order, or a



document purporting to be a certificate, have been handed in, and that A.'s name appears on the register (*Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512).

**George Whitechurch, Limited v. Cavanagh**, [1902] A. C. 117.

Transfers of shares were lodged with the secretary of the company without the certificates. The secretary fraudulently certified that the certificates were in the company's office:—**Held**, the company was not liable. A company does not do more than authorise the secretary to give receipts for certificates which have actually been lodged.

The company usually retains the original certificate, and when the transfer is complete the original certificate is cancelled and new certificates are issued by the company. If the company negligently parts with the original certificate and enables the transferor to commit a fraud, then

- (1) it may be liable to the transferee if he is damaged thereby ; but
- (2) it is not liable to any one else.

**Longman v. Bath Electric Tramways, Limited**,  
[1905] 1 Ch. 646.

B. transferred 1500 shares to H. and M. The company certified the transfer, and by mistake sent the original certificates to B. B. borrowed money from L. on the security of these certificates:—**Held**, the company was not liable to L.

**If a transfer is forged**, and the company registers the transfer and gives a certificate to the transferee, the true owner remains entitled to be put back on the register. The company does not incur any liability in damages by putting the transferee's name on the register, but if it issues a certificate, and any person

acts on the faith of it and suffers damage, the company will be liable (*Bloomenthal's Case*, [1897] A. C. 156).

When the company receives a transfer for registration, it usually writes to the transferor telling him of the proposed transfer, and saying that the transfer will be registered unless he objects. This gives the holder of shares an opportunity of preventing fraudulent or forged transfers from taking effect. The holder is not bound to reply to the letter, and if he does not, he will not be thereby estopped from denying the validity of the transfer (*Barton v. London and North Western Rail. Co.* (1890), 24 Q. B. D. 77).

If a shareholder transfers his shares, and the transfer turns out to be invalid, he remains liable for calls on the shares. See *Addison's Case* (1870), 5 Ch. App. 294, on p. 78, *ante*.

If the transfer is valid, the transferee becomes liable, on an implied contract, to pay subsequent calls, and to indemnify the transferor against any liability in respect of them, subsequent to the date of the transfer (*Levi v. Ayres* (1878), 3 App. Cas. 852).

Trifling irregularities in the execution of a transfer do not make it void.

Thus a transfer may be good, though the shares are wrongly numbered (*o*); and if the transferee is registered as the holder of the shares the transfer will be effective though it is not signed by the transferee (*p*).

Transfers made during the winding up of the company are void, unless sanctioned by the court (*q*).

(*o*) Buckley, p. 581.

(*p*) *Re Taurine Co.* (1883), 25 Ch. D. 118.

(*q*) See p. 228, *post*.

## SECTION 4.

**Transmission.**

**On the death of a shareholder** his shares vest in his personal representatives (*r*), and his estate remains liable for calls. His representatives can sell the shares without being registered, but they are entitled to be put on the register if they wish.

If the representatives are thus put on the register, or if they buy new shares on behalf of the deceased's estate, they become personally liable for calls, but are entitled to be indemnified by the beneficiaries. In order that the company may get the benefit of this liability, the articles frequently contain clauses intended to induce or compel the representatives of a deceased shareholder to be registered within a certain time. See Article 39, p. 34.

**On the bankruptcy** of a shareholder his trustees in bankruptcy can sell and transfer his shares, or may repudiate them if there is a liability.

If the shares are repudiated, the company can prove in the bankruptcy of the shareholder for the amount remaining unpaid on the shares. If this is done and the company receives a dividend in the bankruptcy, it cannot afterwards sue the bankrupt for calls; but the shares are not fully-paid shares, and are not entitled to rank as fully-paid shares in the winding up of the company (see *Re West Coast Gold Fields, Ltd.*, [1906] 1 Ch. 1).

**On Marriage.**—Before 1883 on the marriage of a woman entitled to shares, the shares became vested in her husband: now they remain her separate property (*s*).

(*r*) Shares in a limited company are personal property, even though the company holds land. See p. 91.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) s. 1.

On the appointment of new trustees the shares must be transferred to the new trustees by an ordinary transfer. They cannot be vested in the new trustees by a vesting declaration (*t*).

## SECTION 5.

### Share Warrants.

When shares are **fully paid** the company may (if authorised by its regulations) issue **share warrants** under seal, stating that the bearer of the warrant is entitled to the shares therein specified. The shares then become transferable by delivery of the share warrant (*u*).

Such share warrants are (probably) negotiable instruments (*Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658, see p. 157).

Note that this can only be done when the shares are fully paid. No stamp duty is payable on a transfer, but a heavy stamp duty must be paid when the warrants are first issued (*v*).

A share warrant is usually in the following form :

THE COMPANY, LIMITED.

SHARE WARRANT.

This is to certify that the bearer of this warrant is entitled to        fully paid shares of £        each in the above-named company, subject to the regulations of the company and to the conditions indorsed hereon.

(*t*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (3).

(*u*) Companies Act, s. 37.

(*v*) Three times the *ad valorem* stamp duty on a transfer at the nominal value : Stamp Act, 1891 (54 & 55 Vict. c. 39), sched. i.

The conditions indorsed on the share warrant contain the following among other provisions :

1. Warrants shall only be issued on the request of the shareholder.
2. The certificate must be surrendered to the company.
3. Coupons for dividends shall be attached.
4. Dividends may be paid to the bearer of the coupons.

When a share warrant is issued in respect of any shares, the name of the shareholder is struck off the register, because the shareholder thenceforth is the person (whoever he may be) who holds the share warrant, and the history of the shares no longer appears on the register, as the company does not know who the shareholder is, or who is entitled to the dividends. For this reason, "coupons" are attached to each share warrant, dated with the dates on which dividends will become payable during several years following the issue of the share warrant, and the dividend will be paid on each such date to the person who produces the appropriate coupon.

The holder of a share warrant is not strictly a member of the company under s. 24 of the Companies Act (see p. 75), because, though he may have agreed to become a member, his name is not entered on the register. But where there are share warrants the articles usually provide that the holder of a share warrant shall be a member of the company and shall have all the powers of voting, etc., as if he were on the register, and that he must produce his share warrant to the company before he can attend any meeting or vote.

## SECTION 6.

## Calls.

Shares are frequently issued in the following way . (say) £100,000 is offered to the public in 1000 shares of £100 each, payable as to £10 on application, £20 on allotment, another £20 in three months' time, and the remaining £50 **when called for**.

The first two and probably the third of these payments (viz., the £10, £20 and £20), are not "**calls**" (*x*).

If the company wishes to call in the whole or part of the remaining £50, the directors make a "**call**."

Each shareholder is under a statutory liability, in the nature of a specialty debt (*y*), to pay the remaining £50 when thus called upon. The call is made in the manner specified in the Articles, usually by the directors, who pass a resolution at a board meeting and direct the secretary to give all shareholders notice of the call.

If the call is made otherwise than in the manner specified in the Articles, the call is invalid, and the shareholder is not bound to pay.

**Re Cawley & Co.** (1889), 42 Ch. D. 209.

A resolution of the directors was passed, fixing the amount of a call, but it omitted to fix the date of payment:—**Held**, there was no valid call until a subsequent resolution was passed, fixing the date of the call.

Mere trifling irregularities will not make a call

(*x*) *Croskey v. Bank of Wales* (1863), 4 Giff. 314.

(*y*) Companies Act, s. 14.

invalid, and the Articles may provide that a call shall be good in spite of any irregularity.

**Dawson v. African Consolidated Co., [1898] 1 Ch. 6.**

The Articles of the company contained a clause the same as clause 99 on p. 42, *ante*. Three of the directors made a call. One of them happened to be disqualified by having parted with his qualification shares for a few days :—**Held**, the call was good.

The Articles may also provide that if a call is not paid when due, interest will be charged at a certain rate.

The power to make a call is in the nature of a trust to be exercised by the directors for the benefit of the company. If, therefore, a call is made, not for the benefit of the company, but for the advantage of the directors, the call may be prevented by an injunction, or the directors may be compelled to hand over for the benefit of the company the advantage gained by them.

The following is an example of a call properly made.

**New Zealand, etc., Co. v. Peacock, [1894] 1 Q. B. 622.**

The A. company, in accordance with powers in its Memorandum, sold its undertaking to the B. company for shares in the B. company. Some of the capital of the A. company had not been called up, and the A. company called up this capital for the purpose of paying it over to the B. company. Some of the shareholders objected :—**Held**, the call was good.

In the following case the call was held to have been improperly made.

**Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56.**

The directors paid up nothing on their own shares, but made all the other shareholders pay 3s. 6d. on each share, partly on allotment, and partly by a call. The directors did not tell the other shareholders of this difference :—**Held**, this was a breach

of trust, and the directors must pay to the company 3s. 6d. on each of their shares.

The directors may (if authorised by the regulations) allow shareholders to pay up the amount due on their shares before any call has been made, and may pay interest on the amount so paid "**in advance of calls.**"

But directors must only exercise this power if it is for the benefit of the company.

**Sykes' Case (1872), 13 Eq. 255.**

The company had no money wherewith to pay the directors' fees. The directors therefore paid into the company's bank the amounts remaining due on their shares, and on the same day paid the amount to themselves in payment of their fees:—**Held**, this payment was not for the benefit of the company, and the directors remained liable to pay the amount as still due on their shares.

A shareholder who has paid up money in advance of calls, becomes a creditor of the company for the amount due to him as interest; therefore, if there are no profits, the interest must be paid out of capital (*Lock v. Queensland Investment Co.*, [1896] A. C. 461).

Calls cannot be made until the minimum subscription (z) has been subscribed (Companies Act, s. 87).

Calls must be paid in cash: otherwise the shareholder will remain liable on the winding-up of the company. If, however, cash to the amount of the call is actually due from the company to the shareholder for his services, the call may be set off against this amount, for the transaction amounts to a payment in cash (a).

On a transfer of shares, the transferee is under an

(z) See p. 65.

(a) Cf. *Larocque v. Beauchemin*, [1897] A. C. 358, the facts of which case are summarised on p. 80, *ante*.



implied contract to indemnify the transferor against subsequent calls (*b*). If, however, the call was made before the transfer, but payable after the transfer, the transferor apparently remains liable to pay the call; for a transferor "transfers his rights to future payments and his liability to **future** calls" (*National Bank of Wales*), [1897] 1 Ch. at p. 306).

The date when a call is "made," depends on the Articles of the company. If these are silent, the date of the resolution of the directors is usually the date of the call; but it depends on the practice of the company (*c*).

If a call is not paid within twenty years after it is made, the claim of the company is barred under the Statute of Limitations. Debts due from the company cannot as a rule be set off against calls. See p. 245.

## SECTION 7.

### **Forfeiture.**

The directors have no power to declare the shares of any member to be forfeited unless such power is given them by the Articles. See Article 21, on p. 32.

The Articles usually provide that if a shareholder does not pay calls, his shares may be declared forfeited. The shares then become the property of the company, and may be sold for any price they will fetch. That is to say, **forfeited shares may be re-issued at a discount.**

(*b*) See p. 102.

(*c*) *Addams v. Perick* (1859), 26 Beav. 384 at p. 393.

**Morrison v. The Trustees Corporation W. N. (1898) 154.**

Several £10 shares with £3 paid were forfeited. The directors sold them to other shareholders (as £5 5s. shares with £2 5s. paid) for £1 10s. each :—**Held**, this sale was good.

A purchaser of forfeited shares cannot, as a rule, vote until all arrears of calls are paid (*Randt Gold Co. v. Wainwright*, [1901] 1 Ch. 184).

Forfeited shares cannot be cancelled without leave of the court, as this would amount to a reduction of capital.

The power to declare shares forfeited is in the nature of a trust to be exercised for the benefit of the company. Thus, if shares are declared forfeited for the purpose of relieving a friend from liability, the forfeiture may be set aside.

**Re Esparto Trading Co. (1879), 12 Ch. D. 191.**

H. and G. were given certain shares to qualify them as directors. They paid nothing on the shares. Later, the company was not doing well, and H. and G. asked the directors to cancel their shares. This was done :—**Held**, H. and G. were liable to pay the whole nominal amount of their shares.

And it seems that shares cannot be forfeited except for non-payment of calls or other similar reason, as any attempt to forfeit shares for any other reason would probably amount to a purchase of its shares by the company (*Trevor v. Whitworth* (1886), 12 A. C. at p. 417).

Though forfeiture is in the nature of a penalty, equity will not relieve a shareholder from forfeiture if it is duly and *bonâ fide* declared.

**Sparks v. Liverpool Waterworks Co.** (1807), 13 Ves. 428.

By a byelaw of an incorporated company, shares were to be forfeited if calls were not complied with within ten days. S. was absent from London for twenty-seven days after the call was made. His share were forfeited :—**Held**, S. cannot be relieved from the forfeiture.

But a slight irregularity will make the forfeiture void (unless it is the company itself that tries to say that the forfeiture is bad), and the shareholder may bring an action for annulment of the forfeiture.

**Garden Mining, etc., Co. v. McLister** (1875), 1 App. Cas. 39.

Three directors declared certain shares forfeited: but two of the three had been re-elected at a meeting of which the proper notice had not been given (three directors were a quorum):—**Held**, the forfeiture was bad.

Or he may (if the Articles so provide) prove for damages on the winding up of the company (*Re New Chile, etc., Co.* (1889), 45 Ch. D. 598).

Any clause in the Articles is void which provides that a shareholder shall forfeit his shares if he takes any proceedings against the company, or which in any way restricts the right of a shareholder to present a petition for winding up the company (*Pererill Gold Mines, Limited*, [1898] 1 Ch. 122).

Where the liability of the shareholder to pay the call is questioned, the court may restrain the company from declaring the shares forfeited during the trial of the action (*Lamb v. Sambas Rubber Co.*, [1908] 1 Ch. 845).

If shares are forfeited, the company cannot sue the shareholder for the calls which he has not paid, unless the Articles expressly so provide. If they do, he cannot be sued as a contributory, for he has ceased to

be a member, but he may be sued as an ordinary debtor to the company.

**Ladies Dress Association v. Pulbrook**, [1900] 2 Q. B. 376.

A.'s shares were forfeited for unpaid calls. More than one year afterwards the company was wound up. If A.'s liability depended on his being a contributory to the company, he could not be made to contribute after ceasing to be a member for one year:—**Held**, A. was liable as an ordinary debtor, and could be sued.

## SECTION 8.

### Surrender.

The articles frequently give power to the directors to accept surrenders of shares; this relieves them from going through the formality of forfeiture, if the shareholder is willing to surrender the shares. But a **surrender can only be accepted where a forfeiture would be justified.**

**Bellerby v. Rowland and Marwood's Co., Limited**,  
[1902] 2 Ch. 14.

Three of the directors of a company, in order to relieve the company of a loss of £4000 which had been incurred, agreed to surrender for the benefit of the company several of their shares. The shares were £11 shares, and had been paid up to the extent of £10 per share. **Held**, the surrender was void, and the directors remained holders of the shares.

"A company cannot be a shareholder in itself. Every surrender of shares, **whether fully paid up or not**, involves a reduction of capital which is unlawful except when sanctioned by the court. Forfeiture is a statutory exception, and is the only exception." (*d*).

(*d*) Per Cozens-Hardy, L.J., at p. 32. This dictum, however, appears to go much further than any other authority; for, in *Trevor v. Whitworth* (1886), (12 A. C., at p. 418), it was said that each case must depend on its own circumstances.

So also the surrender will be void if it amounts to a purchase of the shares by the company, or if it is accepted for the purpose of relieving a member from his liabilities (*Lord Wallscourts' Case*, W. N. (1899), 258).

## SECTION 9.

### Lien.

The Articles generally provided that the company shall have a first **lien** on the shares of each member for his debts and liabilities to the company. See Article 26, on p. 33.

The effect of this is to give a mortgage or charge to the company over the shares of each member to secure any debt which may be due from the member to the company. The lien also extends to the dividends on the shares.

Power should also be given to the company to enforce the lien by sale. For though the company has a mortgage there is some doubt whether it is a mortgage **by deed**, and if it is not, no power of sale is implied under s. 19 of the Conveyancing Act, 1881.

The company cannot enforce its lien by **forfeiture** : for this would amount to foreclosure without an order of the court. Any clause in the Articles giving the company power to do so (except where the lien is for unpaid calls), would probably be void (see p. 110, *ante*).

If the company has a lien on A.'s shares for a debt, and A. raises the money from B. to pay the debt, A. may call upon the company to assign its lien to B.

**Everett v. Automatic Co.**, [1892] 3 Ch. 506.

E. owed £4670 to the company. The company pressed for payment and threatened to sell E.'s shares. H. agreed to pay the £4670 to the company at the request of E., on condition that the company transferred its lien on the shares to him (H.). The company refused to do this:—**Held**, the company was bound to transfer its lien.

**Priority.**—If a shareholder mortgages his shares and the mortgagee gives notice to the company, and then the shareholder incurs a liability to the company, the mortgage has priority over the lien to the company.

**Bradford Banking Co. v. Briggs** (1886), 12 App. Cas. 29.

The Articles gave the company a “first and paramount lien” over the shares for calls, etc. A shareholder deposited his share certificates with the bank as security for an overdraft. The bank gave notice to the company. Then the shareholder became indebted to the company for calls. The company claimed—

- (1) A first lien by agreement;
- (2) that it need not take notice of any trust:—

**Held**, the bank have priority. The notice was not “notice of a trust.”

But the regulations may provide that any mortgagee who takes with notice of the company's lien, may be postponed to that lien.

The Articles should give the company a lien for all sums in which a shareholder be “indebted” to the company. This is better than the word “due,” for this reason: Suppose a shareholder owes money to the company and gives a bill of exchange payable in six months, the debt is not due, though the shareholder is indebted, so that the lien will only attach if “indebted” is used (*e*).

The company may enforce the lien against the registered shareholder even though he is only a trustee.

(*e*) *Stockton Iron Co.* (1875), 2 Ch. D. 101.

**New London and Brazilian Bank v. Brocklebank (1882)**  
21 Ch. D. 302.

The trustees of a marriage settlement invested some of the trust funds in 123 £20 shares in the company. The Articles contained clause 26 on p. 33, and also provided that the lien should apply to a debt due from a member jointly with other persons who were not members. One of the trustees was a partner of a firm which owed money to the company:—**Held**, the company has a lien for the partnership debt over the 123 shares.

But the lien of the company would not prevail, if the company had notice of the trust before the debt to the company was incurred (*f*).

It seems to follow that if a shareholder sells his shares, they do not become subject to a lien for debts incurred by him after the transfer has been lodged with the company for registration, even though the company refuse to register the transfer.

If a shareholder only sells some of his shares the buyer can insist on the company paying itself first out of the shares which are not sold (*Gray v. Stone and Funnell* (1893), 69 L. T. 282).

The death of a shareholder does not destroy lien; in fact, the lien is good if it is first imposed after his death (*Allen v. Gold Reefs*, [1900] 1 Ch. 656; see p. 53).

(*f*) *Bradford Banking Co. v. Briggs & Co.* (1886) 12 A. C. 29.

## CHAPTER IX.

### CAPITAL.

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THE word “capital” is used in several senses—

(1) **Nominal capital** = the nominal value of the shares which the company is authorised to issue by its Memorandum. This must be stated in the Memorandum, and also each year in the annual summary (*a*).

(2) **Issued capital** = the nominal value of the shares actually issued.

(3) **Paid-up capital** = the amount paid up or credited as paid up on the shares.

(4) **Capital assets** = the actual property of the company.

(5) **Debenture capital** = The amount borrowed by the company and secured by debentures.

This is not a proper use of the word “capital,” as borrowed money is not capital at all.

#### SECTION 1.

#### Classes of Capital.

The capital may be divided into different classes of shares, or it may consist wholly or partly of stock (see p. 120). This may be provided either in the Memorandum or in the Articles. Usually the Memorandum gives the company power to divide the capital

(*a*) Companies Act, s. 26.



into classes with special, qualified or deferred rights, and the Articles specify the rights of each class of shareholders. If no power is given to sub-divide capital either in the Articles or in the Memorandum, the company can give itself power to do so by altering its Articles (*Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361). See p. 48.

If the rights of the various classes are fixed in the Memorandum, the company cannot change the rights of the different classes except by a special resolution confirmed by an order of the court (unless the Memorandum itself gives the company power to vary the rights; *Re Welsbach Co.*, [1904] 1 Ch. 87); and no special privilege of any class can be interfered with except by a resolution passed by the shareholders of that class in the manner mentioned in section 45 of the Companies Act (see p. 123, *post*). If the rights of the different classes of shareholders are fixed by the articles and not by the Memorandum, they can be altered by special resolution without leave of the court (*Re Australian Estates Co.*, [1910] 1 Ch. 414).

Capital is frequently divided into—

- (1) Preference shares;
- (2) Ordinary shares;
- (3) Deferred shares.

**1. Preference shares.**—The holder of preference shares is usually entitled to a fixed dividend of, say, five per cent. before any dividend is paid on the ordinary shares. But if so, he is usually not entitled to more than his five per cent. however prosperous the company may be.

Preference shares are either **cumulative** or **non-cumulative**. Where they are cumulative, then, if the profits of the company in any year are not sufficient to pay the fixed dividend on the preference shares, the deficiency must be made up out of the profits of subsequent years.

Preference shares are presumed to be cumulative, and ambiguous language in the Articles will not be enough to make them non-cumulative.

**Foster v. Coles**, [1906] W. N. 107, and 22 T. L. R. 555.

The articles originally provided that the preference shares should be cumulative. The Articles were altered on re-construction and the word "cumulative" was omitted :—**Held**, they were still cumulative, as there was no express contrary intention.

But they may be made non-cumulative by express provision or by any language which is sufficiently clear.

**Staples v. Eastman Photo Co.**, [1896] 2 Ch. 303.

The Articles provided that "The holders of preference shares shall be entitled **out of the net profits of each year** to a preference dividend at the rate of ten per cent. per annum :—**Held**, this was sufficient to make the shares non-cumulative (*b*).

Unless the preference shares are made "**preferential as to capital**," they are paid off equally with the ordinary shares on the winding-up of the company.

**Welton v. Saffery**, [1897] A. C. 299, at p. 309.

The original shares were issued to the directors only. Later, more shares were issued as "ordinary," "discount," and "bonus" shares. The "discount" shares were issued at a discount, the

(*b*) And see *Adair v. Old Bushmills Co.*, [1908] W. N. 24.

bonus shares for nothing. These, of course, had to be paid up in full, but the holders contended that they need only pay up sufficient to pay off the debts, and need not pay the rest of the amount due on their shares for the purpose of making an equal division among the shareholders:—**Held**, the company could have issued shares if it liked, which, **after the debts had been paid**, should be paid in full before any other shares; but the company had not done so. Therefore the whole capital must be paid up, and the surplus, after paying off the debts, divided equally among the shareholders.

If, however, the preference shares are made “preferential as to capital,” any surplus capital of the company after payment of debts will (apart from special provisions in the articles (*c*)) be applied first in paying off the capital of the preference shares, then in paying off the capital of the ordinary shares, and the remaining assets will be divided rateably between the preference and the ordinary shares (*Re Espucla Land Co.*, [1909] 2 Ch. 187).

**2. Ordinary shares.**—Generally the greater part of the net profits of the company, after paying the fixed dividend on the preference shares (if any), are paid as dividend on the ordinary shares.

As to how such dividends are paid, see Chapter X.

**3. Deferred shares or founders' shares.**—These shares are usually entitled to a proportion of the profits if the dividend on the ordinary shares amounts to more than a fixed amount, *e.g.* the deferred shares may be entitled to half the profits after a dividend of ten per cent. has been paid on the ordinary shares.

Deferred shares are usually taken by the promoters.

(*c*) As in *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521. Where there were special provisions that arrears of dividend on the preference shares should be paid off first.

Sometimes they are allotted to them as fully paid up in consideration of their bearing the expenses of promotion, or they may be issued by way of bonus or commission to persons who subscribe for ordinary shares. In either of these cases a contract or particulars of a contract must be filed with the registrar (*d*), and the number of founders' shares must be stated in the prospectus or statement in lieu of prospectus (*e*).

**Reserve capital.**—A company may by special resolution declare that any portion of its capital, which has not been already called up, shall not be capable of being called up except in the event of and for the purpose of the company being wound up (*f*).

That is, reserve capital is capital which cannot be called in except on winding up.

Reserve capital cannot be turned into ordinary capital without leave of the court, and it **cannot be dealt with or charged by the directors.**

**Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28.**

The company by special resolution declared that £5 out of each £10 share should be reserve capital. The company then issued debentures charging its undertaking and property, including its uncalled capital :—**Held**, the reserve capital of £5 per share was not charged, and the debenture holders had not therefore a first claim upon it.

**5. Stock.**—When shares have been fully paid up, they may be turned into stock (*g*). Stock is not divided into equal parts or shares, and the divisions are not numbered, but it may be divided into any

(*d*) See p. 81.

(*e*) See p. 61.

(*f*) Companies Act, s. 59.

(*g*) Notice must be given to the Registrar (Companies Act, s. 42).

amounts. Thus it would be possible to hold £10 6s. 8d. of stock, though the shares had originally been £100 shares.

It may be either (1) registered stock.

Then a register of stockholders is kept, and stock certificates similar in form to share certificates, are granted, and the stock is transferred by similar transfers, and the dividends are paid in the same way as in the case of shares.

Or (2) unregistered stock.

Then share warrants are issued to the holders, and these are transferable by delivery.

Stockholders are members of the company, and can vote at meetings, but if the stock is unregistered they must prove their right to the stock before voting.

The difference between shares and stock is explained by Lord CAIRNS in *Morrice v. Aylmer* (1874), 10 Ch. App. 148, at p. 154:

“The use of the term ‘stock,’ merely denotes that the company have recognised the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, *e.g.*, of directors who must possess a certain number of shares, and that the meetings shall be of persons entitled to this stock who meet and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock.”

And it was there held that a bequest of shares in a company would include stock.

## SECTION 2.

### Increase and Alteration of Capital.

A company may increase or alter its capital if authorised to do so by its regulations (*h*). No special

(*h*) Companies Act, s. 41.

method is specified in the Act (*i*). (Contrast this with **reduction** which must be by special resolution, confirmed by the court.) Notice must be given to the Registrar.

If the regulations do not authorise the company to increase or alter its capital, it may alter its articles by special resolution and give itself the power to do so (*j*). The new capital may consist of preference, ordinary or deferred shares, provided there is nothing in the Memorandum to prevent it. If there is, the Memorandum may be altered by leave of the court (*k*).

**Capital is increased** when a company has issued all its authorised capital and requires more funds, *e.g.* to extend its business. Thus, the capital may be increased from £20,000 in 20,000 ordinary shares of £1 each, by the addition of £10,000 in 100 five per cent. preference shares of £100 each.

Stamp duty is payable on the amount by which the nominal capital of the company is increased (*l*).

**Capital is altered** when shares are **consolidated**.

*E.g.* every twenty 1s. shares are turned into one £1 share.

**Or sub-divided.**

*E.g.* every £1 share is turned into 20 1s. shares. This can be done under s. 41 of the Companies Act, provided the proportions of the amounts paid and unpaid remain the same.

On sub-division of shares, preferential rights may be attached to one part of each old share; *e.g.*, each old share may be divided into one preferred share and one deferred share.

(*i*) The power may be delegated to the directors: *Mosely v. Koffyfontein Mines, Limited*, [1910] W. N. 176.

(*j*) The alteration of the articles and of the capital may be effected by one resolution: *Campbell's Case* (1873), L. R. 9 Ch. Ap. at p. 21.

(*k*) See p. 117, *ante*.

(*l*) *Attorney-General v. Anglo Argentine Co.*, [1909] 1 K. B. 677.

Capital may also be altered by being **re-organised**, *i.e.*, by altering the rights of the holders of different classes of shares; but if this involves an alteration of the Memorandum it must be done by a special resolution confirmed by the court, and no special rights attached to any class can be interfered with except by a resolution passed by a majority in number of the shareholders of that class who hold between them at least three-fourths of the capital of that class, and confirmed in the same way as a special resolution (*m*).

### SECTION 3.

#### Reduction and Diminution of Capital.

Where some of the capital of the company has been lost, the company ought not to pay dividends out of its profits without making provision for this loss. If the loss is very great, this would practically make it impossible for the company to pay dividends at all: consequently the company is given power to write off the lost capital and pay dividends without regard to this loss.

A company may reduce its capital by special resolution confirmed by the court, if its regulations contain power to do so (*n*). This can be done

- (1) by reducing the liability of members for uncalled capital;
- (2) by writing off lost capital.
- (3) by paying off capital which is in excess of the wants of the company, or in any other way whatever which may be approved by the court (*n*).

It is not sufficient that the Memorandum contains

(*m*) Companies Act, s. 45, and see p. 117, *ante*.

(*n*) Companies Act, s. 46; and see *Poole v. National Bank of China*, [1907] A. C. 229.

power to reduce, unless the Articles provide for it also (*Re Decine Patent Packing Co.*, [1903] W. N. 82). If they do not, they must be altered by special resolution.

The following case shows how capital may be reduced by leave of the court, and may be altered in two ways :

**Re Welsbach Incandescent Co.**, [1904] 1 Ch. 87.

By the Memorandum, the capital was to be £3,500,000 divided into—

- (1) £5 five per cent. cumulative preference shares ;
  - (2) £1 ordinary shares to be paid seven per cent. after (1) ;
  - (3) £1 deferred shares to be paid seven per cent. after (2) ;
- and the rights of the different classes might be modified by special resolution.

More than £2,000,000 of the capital was lost.

A special resolution was passed that the capital be reduced to £1,345,000 divided into—

- (1) preference shares of 13s. each ;
  - (2) ordinary shares of 5s. each ;
  - (3) deferred shares of 1s. each ;
- (*i.e.* each £1 ordinary share became a 5s. share, etc.)

Then by a special resolution all these were turned into stock, and each £2 of stock was re-converted into one £1 six per cent. preference share, and one £1 ordinary share :—**Held**, resolution confirmed : the court being satisfied that the £2,000,000 had been really lost, and that the scheme was fair and reasonable.

The most usual form of reduction is an “**all round reduction**” ; *i.e.*, the lost capital is written off all the shares in proportion to their nominal value : but it may be written off one class of shares and not off others.

**Re Quebrada Copper Co.** (1888), 40 Ch. D. 363.

The company lost some capital, and passed a resolution to write it all off the ordinary shares, and not to touch the preference shares :—**Held**, resolution confirmed ; but only after full notice



of the effect of this resolution had been given to all the shareholders.

Neither form of reduction will be allowed if it is unfair to any class of shareholders.

**Barrow Haematite Co., [1900] 2 Ch. 846.**

The capital was divided into preference and ordinary shares. The preference shares had no preference as to capital, and no **voting power**. No dividends had ever been paid on the ordinary shares. A resolution was passed to reduce the capital by one-quarter all round:—**Held**, this was not fair on the preference shareholders. Resolution not confirmed.

But the fact that the shares were never paid for in cash will not prevent the reduction, if a proper contract was filed under section 88 of the Companies Act (*Re Omnium Investment Co.*, [1895] 2 Ch. 127), nor the fact that the voting power will be altered (*Re Colmer, Ltd.*, [1897] 1 Ch. 524).

A forfeiture of shares may, unless the shares are re-issued, involve a reduction of capital. This appears to be the only case in which a reduction of capital can take place without the leave of the court.

**Form of proceedings to obtain the sanction of the court.**—The special resolution is first passed. Then the company must apply to the court by petition to confirm the resolution.

The petition is in the following form :

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

In the Matter of the Blank Company, Limited and Reduced,  
and

In the Matter of the Companies (Consolidation) Act, 1908.  
To His Majesty's High Court of Justice.

The humble petition of the Blank Company, Limited and Reduced, sheweth as follows :

(1) Your petitioner, the above-named company, was incorporated, etc.

Here state : The nature and history of the company.

The special resolution.

Facts showing that it is a proper case for reduction.

If the reduction involves a return of capital or a reduction of liability for uncalled capital, an inquiry is ordered as to the debts and liabilities of the company, and all the creditors must consent or be paid off.

Where capital is reduced on the ground that it has been lost, evidence is usually given to prove the loss (*o*).

There has been some conflict of authority as to the form in which the order should be made (*p*).

If the order is made, and the petition confirmed, the order must be advertised, and the words "and reduced" added to the name of the company for a short period (Companies Act, s. 48). But the addition of these words may be dispensed with, *e.g.*, if the company is carrying on business abroad (*Sumatra Tobacco Co.*, W. N. (1898) 80). The object of the addition of these words is to give notice to creditors who may be giving credit to the company on the faith of the amount of capital which appears in the Memorandum.

The County Court has jurisdiction to sanction the

(*o*) In *Re Louisiana, etc., Co.*, [1909] 2 Ch. 552, the reduction was confirmed without any evidence of the loss; but it appears that Lord Macnaghten, in *Poole v. National Bank of China*, [1909] A. C. 229, merely laid down the rule that, where there is any other sufficient reason for reduction, loss need not be proved; and it should be noted that in the *Louisiana Co.*'s case it was certified that there were no creditors.

(*p*) *Lees Brook Spinning Co.*, [1906] 2 Ch. 394, followed in 1906 W. N. 202, and 1909 W. N. 23—not following *Re Calgary Co.*, [1906] 1 Ch. 141.

reduction if the capital is not more than £10,000, but the High Court has also jurisdiction in such a case (*q*).

Capital may be “**diminished**” by cancelling shares which have not been taken up or agreed to be taken up by any person. This may, if the articles so provide, be done by an ordinary resolution (*r*). It is not a reduction of capital (*s*).

A company may reduce its paid-up capital without reducing its nominal capital.

This is effected by a special resolution that accumulated profits shall be returned to the shareholders in reduction of the amount paid up on their shares, the liability on the shares being increased by the same amount (*t*). The leave of the court is not required for this, as the nominal capital is not reduced (*u*). The amount so returned will be payable to a tenant for life as income unless the proper resolutions have been passed (*x*).

(*q*) *Re Portsmouth, etc., Cleaner Co.*, [1908] W. N. 203.

(*r*) Companies Act, s. 41 (1).

(*s*) Companies Act, s. 41 (4)

(*t*) Companies Act, s. 40.

(*u*) See generally *Neale v. City of Birmingham Tramways*, [1910] W. N. 175.

(*x*) *Re Piercy*, 1907] 1 Ch. 289.

## CHAPTER X.

## DIVIDENDS.

DIVIDENDS are the profits of trading divided among the members in proportion to their shares.

The proportion may be determined by agreement in the Articles ; if not, dividends are paid on each share in proportion to the nominal value of that share, without reference to the amount paid up on it.

**Oakbank Oil Co. v. Crum** (1882), 8 App. Cas. 65.

The capital was divided into 40,000 £1 shares fully paid up, and 20,000 £1 shares with 5s. only paid up. A dividend was declared in proportion to the amount paid up on the shares :—**Held**, this could not be done.

The Articles therefore sometimes provide that the dividends shall be paid to the shareholders “in proportion to the amounts paid up on the shares held by them respectively.”

The dividends in each year on the ordinary shares vary with the amount of the profits made by the company : but the dividends on the preference shares are usually at a fixed rate.

The power to pay dividends is not expressly given by the Companies Acts, but it is inherent in every trading company, and it need not be given by the Memorandum.

The mode of payment of dividends is determined by the Articles. These generally provide that dividends

are to be paid by the directors with the sanction of a general meeting.

The declaration of a dividend creates a debt (*a*) from the company to each shareholder, for which, he is entitled to sue.

**Re Severn and Wye Rail. Co., [1896] 1 Ch. 559.**

R. held shares in the company upon which dividends were declared from 1832 to 1873. These dividends were never claimed or paid. In 1896, the question arose whether the right to the dividends was barred:—**Held**, when a company declares a dividend, a debt immediately becomes payable to each shareholder, for which he can sue at law, and the Statute of Limitations immediately begins to run.

The debt is in the nature of a specialty debt, and is not barred until twenty years have elapsed.

**Re Drogheda Steam Packet Co., [1903] 1 I. R. 512.**

Dividends were sued for more than six years, but less than twenty years after they were declared;—**Held**, “the right to the shares is evidenced by a certificate under the seal of the company, and the certificate constitutes a specialty obligation, and such certificate incorporates the Articles of Association.” Therefore they were not barred.

The most important rules as to payment of dividends are (1) **dividends should only be paid out of profits**, and (2) **dividends cannot be paid out of capital**.

**See Re Sharpe, Masonic Co. v. Sharpe, [1892] 1 Ch. 154.**

*Exception*: Where shares are issued for raising money to be spent on the construction of works, the company may pay interest on the capital so raised, though no profits are earned, if the

(*a*) As between tenant for life and remainderman dividends may be apportioned (*Re Oppenheimer*, [1907] W. N. 54).

payment is (1) authorised by the Articles, (2) sanctioned by the Board of Trade, and (3) not more than 4 per cent. (*b*).

These rules are clear, but difficulties arise in determining in each particular case whether the dividends have really been paid out of capital or not.

Thus, suppose a company has some freehold premises which are increasing in value, and leasehold premises which are decreasing, and the business of the company is to buy and sell coal: and suppose the capital account of the company for the last two years shows the following result:

Capital Account.

	For 1909.	For 1910.
	£	£
(1) Leaseholds worth ... ..	10,000	8,000
(2) Freeholds worth ... ..	10,000	11,000
(3) Stock of coal worth ... ..	10,000	5,000
(4) Excess of receipts for coal over cost of coal bought ...	5,000	15,000

Disregarding (1), (2), and (3), the profits for 1910 would appear to be £15,000. But this is obviously too much, for the stock of coal has been lessened by £5000, and this should be deducted. Also the leasehold and freehold premises together are worth £1000 less than in the previous year, and this £1000 *ought* to be deducted, making the profit for the year £9000. But whether this £1000 **must legally** be deducted is a question of some difficulty.

The cases seem to show that the capital account and the revenue account must be kept separate.

A distinction must be drawn between—

- (1) “**Circulating capital**,” *i.e.*, “property acquired or produced with a view to re-sale or sale at a profit” (*e.g.*, the coal in this case), and

(*b*) Companies Act, s. 91.

- (2) "**Fixed capital**," *i.e.*, "property acquired and intended for retention and employment with a view to profit" (*c*) (*e.g.*, the leaseholds and freeholds above).

Both legally and commercially any loss of circulating capital must be accounted for before the profits are ascertained.

Commercially also any loss or depreciation of "**fixed capital**" should be taken into account, and this is generally done by means of a sinking fund, but legally there are cases in which profits may be paid away as dividends without providing for loss or depreciation of fixed capital. Any improvement or appreciation of fixed capital may, however, be counted as profit.

The following cases show the extent of the rule :

**Lee v. Neuchatel Ashphalte Co.** (1887), 41 Ch. D. p. 1.

The company was formed to take over a concession to work asphalt, granted for twenty years, but renewed in 1871 for another twenty years. The concession was paid for by 100,000 shares and £8000 in cash. The accounts of 1885 showed a surplus of £17,000. The directors proposed to pay away in dividends £16,000 of this, without making any allowance for the fact that the concession was running out :—**Held**, (1) the assets had not depreciated (owing to the renewed concession, they were more valuable than when the company was formed); (2) the company was not bound to make up in available assets the whole of its nominal share capital, before paying dividends; (3) the directors were not bound to set aside a sinking fund.

The next case carries the rule further :

**Verner v. General Commercial Trust**, [1894] 2 Ch. 268.

The company was formed to purchase investments, and to borrow and lend money and pay the profits as dividends. In

(*c*) Buckley, p. 653.

1894, the receipts exceeded the expenditure by £23,000; but many of the investments had deteriorated, making a loss on the value of the assets of £250,000:—**Held**, “the statutes do not expressly prohibit payment of dividends out of capital, but their provisions are wholly inconsistent with the return of capital to shareholders.” The dividend may, however, be paid in this case. There is no legal liability to have even a sinking fund.

Note that in this case the investments were intended to be retained, and it seems only reasonable that a company should not be bound to meet every depreciation of its investments before paying dividends. For such depreciation may often be only temporary.

Had the business of this company consisted of speculating in investments, the investments would have been circulating capital, and any loss must have been accounted for.

The effect of these cases has been explained and somewhat lessened by FARWELL, J., in—

**Bond v. Barrow Haematite Co.**, [1902] 1 Ch. 353.

The company lost £200,000 owing to a lease of certain mines becoming useless through flooding, and £50,000 owing to depreciation of its property generally:—**Held**, *Verner's Case* does not lay down a general rule that in **every** company fixed capital may be sunk or lost; but that there are companies in which this **may** be done. The £200,000 loss is a loss of circulating capital, there being no difference between mines of ore and a stock of ore.

As to the £50,000 loss, the burden of proof is on the directors to show (1) that it is fixed capital, and (2) that in a company of this nature such fixed capital may be sunk. *Lee v. Neuchatel* is not an authority for stating that no company owning depreciating property need ever create a depreciation fund. In that case there had been no loss of assets.

The result of these cases is, that it is at any rate unsafe for directors to pay away profits as dividends without making some provision for making good loss of fixed capital.

The balance-sheet ought to be made out on sound



business lines. The proper way is to take the facts as they stand, estimate the value of the property and the losses sustained, as compared with the previous year and strike the balance. If this is done *bonâ fide* the dividend will not be fraudulent, even if some of the property was in fact valued too high.

**National Bank of Wales**, [1899] 2 Ch. 629 at p. 670, affirmed as **Dovey v. Cory**, [1901] A. C. 477.

Bad debts were included in the balance-sheet as assets : if these had been written off, no dividends could have been paid. The defendant director relied on the statements of the manager that the debts were good :—**Held**, a director is not liable if he acts on the advice of a person whom he believes to be capable and honest : and the defendant was not liable.

If directors do pay dividends out of capital, they may be sued for the whole amount of the dividend actually paid out of capital. But they may recover from each shareholder the dividend received by him, if he knew that it was paid out of capital ; and a shareholder who took the dividend with such knowledge cannot sue the directors (*Towers v. African Tug Co.*, [1904] W. N. 54).

**As to accretions.**—Any increase in the value of the assets may be paid out as dividend.

**Lubbock v. British Bank of South America**, [1892], 2 Ch. 198.

The company had part of its undertaking in Brazil with a capital of £500,000. It sold this part for £875,000 and agreed not to carry on a similar business. Later, the company paid £75,000 to be released from this agreement, so that the net profit on the sale (after various other payments) was £205,000 :—**Held**, this may be distributed as profit. (The judgment of CURRY, J., at pp. 200, 201 should be read as to the mode of taking accounts.)

But the whole accounts for the year must be taken into account.

**Foster v. New Trinidad, etc., Limited**, [1901] 1 Ch. 208.

The company had bought up an old company : among the assets were promissory notes for \$127,000 which were treated in the balance-sheets as a bad debt and of no value. The notes were unexpectedly paid up in full. The directors proposed to distribute \$100,000 of this as profit:—**Held**, “the question of what is profits depends on the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases though there has been a depreciation of capital, an estimated accretion in value of one item cannot be deemed to be profits without reference to the whole accounts fairly taken.”

On the whole, in practice, business principles are generally followed, and this was meant to be done, otherwise the provisions of the Companies Act allowing capital to be written off when lost would be useless (*d*).

**Profits paid to a reserve fund** remain profits and may be paid as dividends though there is a loss on capital (*e*).

**Dividends must be paid in cash** unless there is an express agreement to accept shares or debentures, etc.

**Hoole v. Great Western Rail. Co.** (1867), 3 Ch. App. 262.

The company had made profits, but had no available capital, and proposed to give the shareholders fully-paid shares instead : **Held**, the shareholders are entitled to claim payment in cash.

When shares are transferred at or near the time of a declaration of dividend, the agreement usually specifies whether the transferee or the transferor shall get the

(*d*) See p. 123.

(*e*) *Re Hoare & Co., Limited*, [1904] 2 Ch. 208 at p. 213.

benefit of the dividend. If the transferee is to get the dividend the transfer is said to be "**cum dividend**," if not, "**ex dividend**."

If there is no agreement the buyer is entitled to all dividends declared after **the date of the agreement** for sale.

**Black v. Homersham** (1878), 4 Ex. D. 24.

August 1st, sale of shares by auction; by the conditions of sale the transfer was to be completed on August 29th. August 24th, dividends declared. August 29th, transfer completed :—**Held**, the dividends belong to the buyer. Completion relates back to the time when the purchase was made. The buyer bought the shares on that day at their then value.

must be used to see that the company can be authorised to borrow money for its borrowing powers or borrowing for purposes authorised and to what property of the company it is charged, and what is the (p. 136 of) the charge.

## CHAPTER XI.

### BORROWING POWERS.

Every trading company has an implied power to borrow money for the purpose of its trading; but this power cannot be exercised until the minimum subscription has been subscribed (a). If a company has power to borrow, it has also power to charge its property as security for payment of the loan.

**General Auction, etc., Co. v. Smith**, [1891] 3 Ch. 432.

The company was formed for the purchase and sale of estates, to accept loans on deposit and make advances. The Memorandum contained no power to borrow. The company borrowed on the security of some of its land in order to pay back a deposit:—**Held**, being a trading company, it had full power to borrow and charge its property.

The borrowing powers of a trading company are generally exercised by the directors, but this depends on the Articles.

Other companies have no power to borrow unless the Memorandum of Association gives them power to do so; but they may by applying to the court extend the Memorandum (see p. 25).

Sometimes the Memorandum limits the power to borrow.

*E.g.*, the company may not borrow more than two-thirds of its paid-up capital.

(a) Companies Act, s. 87.

If a company borrows beyond its powers, the borrowing is **ultra vires** and void, and **the securities given are void**, and the lender cannot sue the company for the return of the loan: but

- (1) If the money has not been spent, he can get an injunction to prevent the company from parting with it; or
- (2) He may have an action against the directors on an implied warranty of authority;

**Weeks v. Propert** (1873), L. R. 8 C. P. 427.

A railway company had fully exercised its borrowing powers. The directors advertised for money to be lent on the security of debentures. W. lent £500 and received a debenture. The debenture was declared void:—**Held**, he could sue the directors for breach of warranty, implied from the prospectus that they had power to issue such debentures.

or

- (3) If it has been used to pay off debts which could have been enforced against the company, the lender may sue the company, being subrogated to the rights of the creditors who were paid off.

It is on this principle that "**Lloyd's bonds**" are valid: *e.g.*, a railway company which has exhausted its powers of borrowing, becomes indebted to a contractor for work done. The company gives him in payment bonds for the amount due, payable at a future date with interest, charged upon its property.

The principle is that a company which borrows to pay off existing debts does not thereby increase its liabilities.

**Neath Building Society v. Luce** (1889), 43 Ch. D. 158.

A building society became indebted to some of its members for principal and interest due on a mortgage. It borrowed money, *ultra vires*, to pay off principal and interest :—**Held**, the lenders had a good loan as they were subrogated to the rights of the creditors paid off.

But this subrogation does not give the lenders the same priority that the original creditors had over the other creditors of the company.

**Re Wrexham, Mold, etc., Railway Co.**, [1899] 1 Ch. 440.

The railway company had borrowed up to the full extent of its powers, the loans being secured by A. B. and C. debentures—the A. debentures had priority over the B. and C. debentures. A bank advanced money to pay off the interest on the A. debentures, and then claimed to stand in the place of the A. debenture holders and to be repaid their loan before the B. or C. debentures were paid :—**Held**, when a company borrows money, *ultra vires*, the lender, so far as the money is applied in discharging the legal debts of the company, is entitled to have the loan treated as valid, but not to have a charge in priority to the other creditors.

A company may charge its **uncalled capital** if the Memorandum or Articles allow it, or if they contain words wide enough to cover it.

**Newton v. Debenture Holders of Anglo-Australian Co.**,  
[1895] A. C. 244.

The Memorandum gave power to borrow “on any security of the company” (*b*) :—**Held**, these words authorise a charge on the uncalled capital.

The use of the word “property” in the instrument creating the charge, is not enough to actually charge the uncalled capital.

(*b*) These appear to have been the words upon which the decision turned, and not the further words, “upon the security of any property of the company,” see *Stanley’s Case* (1864), 4 De G. J. & S. 407, *Re Streatham Estates Co.*, [1897] 1 Ch. 15.

**Re Russian Spratts Patent, Ltd., [1898] 2 Ch. 149.**

The company had power to borrow and charge its uncalled capital. It issued debentures charging its "undertaking and all property to which it now is or **shall at any time become entitled**":—Held, this did not create a charge on the uncalled capital.

A mortgage of uncalled capital is usually enforced by the appointment of a receiver (see p. 151) and by an order of the Court giving the receiver power to use the name of the liquidator for the purpose of making calls (*c*).

A company cannot borrow on the security of its **reserve** capital (see p. 120), nor of its books, for they must be kept at the office of the company and be open for inspection. If, therefore, the company charges all its undertaking, the liquidator, on a winding-up, has a better right to the books than the receiver appointed by debenture-holders (*Engel v. South Metropolitan Co.*, [1892] 1 Ch. 442).

Money borrowed by a company may be secured by any one of the following securities or by several of them at once :

(1) **A legal mortgage of specific parts of its property.**

A company can mortgage its freehold or leasehold property in the same way as an ordinary person ; but such mortgages **must be registered**—

(a) On the register kept by the company.

Every company must keep a register of mortgages "specifically affecting property of the company," with a description of the

(c) *Re Westminster Syndicate, Limited*, [1908] W. N. 236.

property charged, the amount of the charge, and the names of the mortgagees (*d*).

Failure to register under this section does not make the mortgage void (*e*).

(b) On the register kept by the Registrar, but only if it is a mortgage of land or for the purpose of securing an issue of debentures, or for any of the other purposes mentioned on p. 158 (*f*).

Non-registration under this section makes the security void.

(2) An equitable mortgage by deposit of title deeds.

This must be registered on the company's register, and if it is for any of the purposes mentioned on p. 158, it must be accompanied by some writing to be filed under s. 93.

(3) A mortgage of chattels.

This must always be registered ; for by section 93 of the Companies Act any mortgage created by an instrument which, if executed by an individual, would be a bill of sale, must be registered ; and a mortgage of chattels by an individual is almost always a bill of sale under the Bills of Sales Act, 1882 (*g*).

(4) Bonds (see 137).

(5) Promissory notes and bills of exchange.

These may be made or accepted on behalf of the company by any person having its authority (*h*), and if the company has on a fair construction of its Memorandum power to do so (*i*).

(6) A floating charge evidenced by **debentures** (see Chap. XII.).

(7) **Debenture stock** (see p. 141).

(*d*) Companies Act, s. 100.

(*e*) *Wright v. Horton* (1887), 12 A. C. 371: penalty £50.

(*f*) Companies Act, s. 93.

(*g*) See 41 & 42 Vict. c. 31, s. 4.

(*h*) Companies Act, s. 77.

(*i*) *Peruvian Railways v. Thames, etc., Co.* (1867), L. R. 2 Ch. 617, 623.



## CHAPTER XII.

**DEBENTURES.**

## SECTION 1.

**Debentures and Debenture Stock.**

A **debenture** (roughly) is a document given by a company as evidence of a charge created by the company in return for a loan.

The word has been used to cover many things, but it generally means “a security for money, called on the face of it a debenture, and providing for the payment of a specified sum at a fixed date with interest half-yearly, and is usually one of a series” (*a*).

**Debenture stock.**—Some difficulty is often felt in attempting to distinguish between debentures and debenture stock ; but the difficulty arises from trying to contrast an instrument securing a debt with a debt itself of another nature, and from the fact that the word “debenture” is often used loosely as referring to the debt secured by debentures. In other words, as in the case of a debenture, there is a debt due from the company (with no special name) secured or evidenced by a document called a **debenture**. So in the case of debenture stock, there is a debt due from the company,

(*a*) Palmer's Company Law, p. 278.

called debenture stock, and secured or evidenced by a document called a **debenture stock certificate**.

**Debenture stock is a debt**, generally secured by a trust deed; it is subdivisible, but otherwise is much the same as a debt secured by debentures.

The difference between a debt secured by debentures and debenture stock is very like the difference between shares and stock (*b*).

The liability of the company is regarded as a liability to pay an annuity rather than as a liability to repay a loan.

"The issue of debenture stock is not borrowing at all; it is the sale in consideration of a sum of money of the right to receive a perpetual annuity" (which may be redeemable) (RIGBY, L.J., [1899] 1 Q. B., p. 138).

The phrase "**mortgage debentures**" is only another name for **debentures** creating a charge on the property of the company; but the stock Exchange objects to an instrument being called a **mortgage debenture** unless it is secured by a trust deed. This is frequently done. See pp. 145 and 154.

There are several kinds of debentures, of which the most usual are—

- (1) Debentures payable to registered holder;
- (2) Debentures payable to bearer.

## SECTION 2.

### Debentures Payable to Registered Holder.

The following is a common form of **debenture payable to registered holder** :

(*b*) A bequest of debentures will carry debenture stock (*Re Herring*, [1908] 2 Ch. 493 at p. 498).

(Registered with the Registrar of Companies, 24th May, 1910.)

## BLANK LIMITED.

Registered office :

## Debenture.

No. 175.

£100.

1. Blank, Limited (hereinafter called, "the company"), will, on the 1st day of January, 1915, or on such earlier day as the principal money hereby secured becomes payable in accordance with the conditions endorsed hereon, pay to \_\_\_\_\_, of \_\_\_\_\_, or other the registered holder hereof for the time being, his executors, administrators, or assigns, the sum of one hundred pounds.

2. The company will in the meantime pay to such registered holder interest thereon at the rate of five per centum per annum, by half-yearly payments on the first day of July and the first day of January in each year, the first of such half-yearly payments to be made on the 1st day of July next.

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

4. This debenture is issued subject to the conditions endorsed hereon, which are to be deemed part of it.

Given under the common seal of the  
company this 19th day of May, 1910.

(Seal.)

The common seal of the company was  
affixed hereto in the presence of

} Directors.

, Secretary.

## THE CONDITIONS BEFORE REFERRED TO.

1. This debenture is one of a series of debentures issued or to be issued by the company for securing principal sums not exceeding in the aggregate the sum of £100,000. The debentures of the said series are all to rank *pari passu* as a first charge on the

property hereby charged, without any priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on any of its property and assets in priority to the said debentures.

2. A register of the debentures will be kept at the company's registered office, wherein will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively. The said register will at all reasonable times during business hours be open to the inspection of the registered holder hereof or his legal personal representative.

3. The registered holder or his legal personal representative will be deemed to be exclusively entitled to the benefit of this debenture, and the company and all persons may act accordingly. The company shall not be bound to enter in the register notice of or in any way to recognise any trust or the right of any person other than the registered holder to any benefit under this debenture, save as herein provided.

\* \* \* \* \*

5 Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his executors or administrators. The instrument of transfer must be delivered at the registered office of the company, duly stamped, with a fee of two shillings and sixpence and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered, and a note of such registration indorsed hereon.

6. No transfer will be registered during the seven days immediately preceding the days by this debenture fixed for payment of interest.

7. In the case of joint registered holders the principal money and interest hereby secured will be deemed to be owing to them upon a joint account.

8. The principal money and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal money and interest shall be a good discharge to the company.

9. The company may at any time give notice in writing to the registered holder hereof his executors or administrators, of its

intention to pay off this debenture, and upon the expiration of one calendar month from such notice being given the principal money hereby secured shall become payable.

10. The principal money hereby secured shall immediately become payable—

- (a) If the company make default for a period of three calendar months in the payment of any interest hereby secured, and the registered holder hereof, after the expiration of the said period of three calendar months, and before such interest is paid, by notice in writing to the company call in such principal money.
- (b) If a distress or execution be levied or sued out upon or against any of the property and assets of the company, and be not paid out within seven days.
- (c) If an order be made or an effective resolution be passed for the winding up of the company.
- (d) If a receiver of the property and assets of the company be appointed by any court of competent jurisdiction.

11. The principal money and interest hereby secured will be paid at the company's bankers for the time being or at the registered office of the company.

12. A notice may be served by the company upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address.

13. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it was posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

[14. Gives power to the debenture-holders to appoint a receiver if any of the events in clause 10 have happened.

15. The registered holder shall have the benefit of the trust deed dated, etc., and made, between the company and A. and B. as trustees for the debenture-holders.]

**As to the form.**—Debentures need not be by deed, but if not, the consideration must be stated. They may be, and often are, accompanied by a trust deed vesting specific property of the company in trustees for

the debentures-holders. Sometimes they create a charge over specific property only.

The date fixed for repayment of the capital is generally five, ten or twenty years after the issue, or they may be payable on demand; or they may be perpetual. If so, the capital money only becomes payable if any of the things specified in condition 10 should happen.

Debentures could always be made "perpetual" in the sense that there need not be any time fixed within which the company was *bound* to pay them off.

But a company could not issue perpetual debentures in the sense that the company **could never pay them off** without the consent of the debenture-holder, unless the company had express power to do so.

See *Southern Brazilian, etc., Co.*, [1905] 2 Ch. 78.

**Now by section 103 of the Companies Act a condition in any debentures making the debentures irredeemable is not void.**

The interest on debentures is a debt, and may be paid out of capital (c).

**As to condition 1.**—"Pari passu" means that all the debentures of this series are to be paid rateably, so that if there is not enough to go round, they shall all abate proportionally. If these words were not put in, the debentures would be payable according to the date of issue, or if they were all issued on the same day, then according to numerical order (*Gartside v. Silkstone, etc., Co.* (1882), 21 Ch. D. 762: see next page).

(c) And may be so treated in the accounts (*Hinds v. Buenos Ayres, etc., Co.*, [1906] 2 Ch. 654).

If these words are put in, a debenture-holder who seeks to enforce his security must sue on behalf of himself and all other debenture-holders of the same series. But he may take other steps against the company to get his own debt paid without consulting the interests of the others, provided he does not attack any specific asset of the company.

The company cannot create a new series to rank *pari passu* with the old series, unless power to do so is expressly reserved.

**Gartside v. Silkstone, etc., Co. (1882), 21 Ch. D. 762.**

150 debentures for £100 each were issued on the same day, numbered 501-650. On Nos. 501-600 it was stated that the issue was for £10,000, to be paid *pari passu*. On Nos. 601-650 it was stated that the issue was for £5000 to be paid "*pari passu*":—**Held**, the 100 must be paid before the 50. The presumption is that deeds are executed according to their dates, and in this case (the date being the same) according to their numbers; and you cannot look outside the deeds themselves to prove that this was not so. (N.B.—If the first deeds had contained power to issue another £5000 *pari passu* with the first issue, the presumption might have been rebutted from the deeds themselves.)

**"Floating charge."**—This means that the assets of the company are charged with the payment of the debt, but the company may deal with any of its assets in the ordinary course of business, until the charge becomes a fixed charge. This happens when the money becomes payable under condition 10, **and** the debenture-holder takes some steps to enforce his security.

**Re Panama Co. (1870), 5 Ch. 318.**

The company charged its "undertaking":—**Held**, this is a good charge. "The word 'undertaking' necessarily infers that the company will go on, and that the debenture-holder could not

interfere until either the interest which was due was unpaid, or until the period had arrived for payment of his principal, and that was unpaid.”

The characteristics of a floating charge are stated by ROMER, L.J., in—

**Re Yorkshire Woolcombers' Association**, [1903] 2 Ch. 284.

The company gave a charge over its book debts, present and future:—**Held**, any mortgage by a company which contains the three following characteristics is a floating charge :

- (1) It is a charge on a class of assets, present and future ;
- (2) That class is one which, in the ordinary course of business, would be changing from time to time ; and
- (3) It is contemplated that until some steps are taken the company shall carry on its business in the usual way.

Unless otherwise agreed, this leaves the company free to make specific mortgages of its property having priority over the floating charge.

**Government Stock Co. v. Manila Rail. Co.**, [1897] A. C. 81.

The debentures created a floating charge. Three months' interest became due, but the debenture-holders took no steps. The company then made a mortgage of a specific part of its property:—**Held**, the mortgage has priority. The debentures remained merely a floating security until the debenture-holders took some steps to enforce their security (*d*).

It has been held that a company may even sell its whole undertaking if that is one of its objects specified in the Memorandum (*e*).

A floating charge is also liable to be postponed to the rights of the following persons if they act before the debenture-holders take steps to enforce their security.

(*d*) See *Cox-Moore v. Peruvian Corporation, Limited*, [1908] 1 Ch. 604.

(*e*) *Re Borax Co.*, [1901] 1 Ch. 326; but as to such a sale, see *Bisgood v. Henderson's Transvaal, Limited*, [1908] 1 Ch. 743.



- (1) A landlord who distrains for rent (*Re Roundwood Colliery Co.*, [1897] 1 Ch. 373).
- (2) A creditor who gets a garnishee order absolute (*Robson v. Smith*, [1895] 2 Ch. 124); (*f*)
- (3) A clerk or servant or other person entitled to preferential payment under the Bankruptcy Acts, has priority over debentures which create only a floating charge (*g*).
- (4) A judgment creditor if the goods are seized and sold by the sheriff before the debenture-holder takes steps.

But if the goods are not **sold**, the floating charge has priority.

*Davy & Co. v. Williamson & Sons*, [1898] 2 Q. B. 194.

The debentures created a floating charge. Goods of the company were seized by the sheriff under a *fi. fa.* Then the debenture-holders for the first time took steps to enforce their security, and claimed priority:—**Held**, the debentures have priority: the debentures being a valid charge, the company had no interest in the property available to satisfy a judgment debt. Seizure of goods by the sheriff is not a dealing with the assets in the ordinary way of business.

(Note that, when the goods are **sold** under the *fi. fa.* they become the property of the purchaser.)

A clause is frequently inserted in the debentures that the company shall not be able to create mortgages in priority to or *pari passu* with the debentures of that issue; but even then a person who takes a mortgage without notice of the debenture gets priority, even by an equitable mortgage by deposit.

(*f*) But not a garnishee order *nisi* (*Norton v. Yates*, [1905] W. N. 175).

(*g*) Companies Act, s. 209.

**Re Valletort Steam Laundry, [1903] 2 Ch. 654.**

The debentures created a floating charge, and contained a provision that the company were not to create any prior charge. The manager forgot this, and deposited deeds with a bank as security. The bank held some of these debentures on deposit for a customer :—**Held**—

- (1) The bank had not constructive notice of the debentures;
- (2) The bank had priority (*h*).

When the debenture-holders take steps to enforce their security, *e.g.*, by the appointment of a receiver (see next page), the floating charge is said to crystallize.

**As to conditions 3 and 8.**—The effect of these clauses is that the company **may** disregard any notice of equities attaching to the debentures.

**Société Generale v. Walker (1885), 11 App. Cas. at p. 30.**

The Articles contained a clause similar to conditions 3 and 8 above :—**Held**, “there was no obligation on this company to accept or to preserve any record of notices of equitable interests or trusts if actually given or tendered to them, and that any such notice if given would be absolutely inoperative to affect the company with any trust.”

But the company **need not** disregard equities, and if the company has equitable claims against the debenture-holder, it may refuse to register the transfer (*Re Palmer's Decorating and Furnishing Co.*, [1904] 2 Ch. 743).

If a condition to this effect was not inserted, a debenture, being a chose in action, would be assignable subject to all equities.

(*h*) And see *Cox-Moore v. Peruvian Corporation*, [1908] 1 Ch. 605.

**Athenæum Society v. Pooley** (1858), 3 De G. & J. 294.

Debentures were issued to P. under an agreement which was a fraud on the company. P. sold them to L., who had no notice of these facts:—**Held**, L., though a *bonâ fide* purchaser for value without notice, being only a purchaser of a chose of action, must take it subject to the equities attaching to it. Therefore L. cannot sue on the debentures (*i*).

**As to condition 5** (p. 144).—The object of requiring all transfers to be delivered to the company, is to secure that the company shall have all the relevant documents in its possession in case of a dispute as to the title to any debentures.

**As to condition 10** (p. 145).—The effect is that if there is undue delay in payment of the interest or if the security becomes endangered, the debenture-holder can immediately take proceedings to recover his money.

**As to condition 14**.—The debenture-holders can always get a receiver appointed by the court if a proper case has arisen, whether or not this clause is inserted. The object of the clause is to enable them to appoint a receiver themselves without applying to the court.

The advantage of getting the receiver appointed by the court is that he is an officer of the court, and any interference with him is a contempt of court (*k*).

The advantage of appointing the receiver under clause 14 is that the debenture-holders can choose

(i) This was before the Judicature Act, 1875 (36 & 37 Vict. c. 66), s. 25 (6), but choses in action are assignable subject to equities under that Act; and see *Re Rhodesia Goldfields, Limited*, [1910] 1 Ch. 239.

(k) No action can be brought against the receiver in any other court (*Re Maidstone Palace, Limited*, [1909] 2 Ch. 283).

their own man; also that he is in a better position if the company is wound up and a liquidator appointed.

**Henry Pound & Sons v. Hutchings** (1889), 42 Ch. D. 402.

Debenture-holders were allowed to appoint a receiver (under clause 14) to take possession, although a liquidator had already been appointed.

But where a receiver has been appointed by the court, the court will put the liquidator in his place to act as both receiver and liquidator (*Re Joshua Stubbs, Limited*, [1891] 1 Ch. 475).

**A receiver appointed by the debenture-holders** (under clause 14) **is the agent of the debenture-holders**, and they are therefore liable on his contracts, unless the power to appoint a receiver expressly states that he is to be the agent of the company (*Robinson Printing Co. v. Chic, Limited*, [1905] 2 Ch. 123).

Note that in this respect he differs from a receiver appointed by an ordinary mortgagee under the Conveyancing Act, s. 19, for such a receiver is expressly declared by the Act to be the agent of the mortgagor.

In either case he is not personally liable on contracts which he makes (*k*).

**A receiver appointed by the court is the agent of the court**, and as the court cannot be liable, the receiver becomes liable personally on his contracts. He is, however, entitled to be indemnified out of the assets of the company in priority to the rights of the debenture-holders (*l*).

**A receiver may be appointed by the court in a debenture - holders' action "** (commenced by one

(*k*) *Gosling v. Gaskell*, [1897] A. C. 575.

(*l*) *Burt v. Bull*, [1895] 1 Q. B. 276; and *Re Glasdir Copper Mines, Limited*, [1905] W. N. 172; and *London United Breweries, Limited*, [1907] 2 Ch. 511.

debenture-holder on behalf of himself and all the others);

- (1) If the principal money has become payable under condition 10 (see p. 145).

Even if the money became due after the writ was issued (*Re Carshalton Estate, Limited*, [1908] 2 Ch. 62).

- or (2) If the security is in jeopardy, even if there has been no default in payment of interest, and no winding up.

*E.g.*, if a judgment creditor has levied execution (*m*), or if a judgment remains unsatisfied (*n*), or in case of other danger to the assets.

**McMahon v. North Kent Iron Works**, [1891] 2 Ch. 148.

The works had been closed and the men discharged. The company was wholly insolvent; but no case had arisen under condition 10. A receiver was appointed.

The receiver, when appointed by the court, must give security for the safety of the assets in his hands. If the plaintiff debenture-holder wishes him to act at once (*i.e.*, before he finds security), the plaintiff must undertake to be responsible until he gives security. The appointment of a receiver must be notified to the registrar (*o*).

The court may supersede a receiver appointed by a debenture-holder, if the appointment was not for the benefit of all the debenture-holders (*Re Maskelyne British Type-writer*, [1898] 1 Ch. 133).

The court may also appoint a manager if it is necessary. A manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern. This rule is not inflexible.

(*m*) *Edwards Standing Rolling Stock Syndicate*, [1893] 1 Ch. 574.

(*n*) *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576

(*o*) Companies Act, s. 94. Penalty, £5 per day.

**Re Victoria Steam Boats, [1897] 1 Ch. 158.**

The company was formed to work passenger steamers on the Thames and also to carry on ferry work at Greenwich and Woolwich, under contracts with the Great Eastern Railway. The company was wound up and stopped the passenger service. The debenture-holders applied for a manager of the ferry business, on the ground that if the contracts were broken, there would be a heavy loss to the debenture-holders:—**Held**, the court has a discretion and will appoint a manager in this case, for though there is no immediate prospect of a sale, there will probably have to be a realisation some day.

If, however, there is no power to sell the business, a manager will not be appointed.

**Marshall v. South Staffordshire Tramways, [1895] 2 Ch. 36.**

A tramway company (under the Tramways Act, 1870) mortgaged all its undertaking:—**Held**, generally the owner of an equitable charge has a right to a judicial sale. “But this does not extend to . . . an undertaking which has been acquired under statutory powers for public purposes, if those purposes will be defeated or . . . seriously affected by a judicial sale.” As there is no power of sale a manager cannot be appointed.

**As to condition 15** (p. 145). The advantages of having a trust deed are (*p*):

- (1) If the company makes default, the trustees are there, ready to take the necessary steps, instead of leaving it to the initiative of some debenture-holder.
- (2) The trustees may be given power to sell and thus to realise the security without the aid of the court.
- (3) The legal estate is vested in the trustees. This prevents a subsequent legal mortgagee from getting priority.

(*p*) Palmer, Co. Prec. III. 71.

- (4) The company can be made to insure, etc., by covenants in the deed.

**Form of the deed (q).**—The deed usually contains the following provisions :—

- (1) Conveyance of freeholds and leaseholds, etc., to the trustees, and
- (2) A floating charge over the rest of the assets of the company.
- (3) The company is to retain possession until it makes default in payment of interest, etc.; then the trustees are to enter and sell.
- (4) Power to the trustees to sell or exchange any of the above-mentioned properties of the company at the request of the company.
- (5) Power to the trustees to convene meetings of debenture-holders, etc.
- (6) Covenants by the company to insure, repair, etc.

Debentures sometimes contain a clause that the rights of the debenture-holders may be modified with the consent of a majority of (say) three-fourths of them, and that this consent shall bind all the debenture-holders (*Sucath v. Valley Gold Co.*, [1893] 1 Ch. 477).

### SECTION 3.

#### Debentures to Bearer.

The object of making a debenture payable to bearer is that it may become a negotiable instrument, that is to say :

- (1) It is transferable by delivery.

(q) As to the stamp on a debenture trust deed, see *Suffield v. Inland Revenue Commissioners*, [1908] 1 K. B. 865.

- (2) A transferee in due course gets a title independent of any defects in the title of the transferor.
- (3) No notice of transfers need be given to the company.
- (4) No stamp duty is payable on a transfer.

As in the case of share warrants, the interest is payable to the bearer of a coupon, which is merely an order on the company or the company's bank to pay a certain sum to the person who presents it on or after a certain date. Several coupons are attached to each debenture and are cut off by the holder one by one as the date for payment of each arrives.

**Form of debentures to bearer.**—The form is much the same as the form of a debenture to registered holder (on p. 143), except that the agreement is to pay “to the bearer on presentation of this debenture” and to pay interest “in accordance with the coupons annexed hereto.”

The conditions indorsed on the debenture contain some of the same clauses, but omit all reference to a register or registered holder, and also contain the following clauses :

- (1) Interest shall be payable only to the person producing the coupon.
- (2) When the principal sum due is paid off, the debenture and coupons must be surrendered.
- (3) The company may safely pay interest to the bearer of the coupon.
- (4) Notices affecting the holders (*e.g.*, of intention to pay off) may be given by advertisement.
- (5) The debenture is to be treated as negotiable.
- (6) On the request of the holder, the company will exchange his debenture for a debenture to registered holder.



**Debentures payable to bearer are negotiable.**—There was at one time some doubt as to this, for at common law an instrument **under seal** could not be negotiable (*Crouch v. Credit Foncier* (1873), L. R. 8 Q. B. 374). But it was held that in the case of a **foreign** instrument under seal, if it was treated by the general custom of merchants as being negotiable, it would be recognised as such by English law (*Goodwin v. Roberts* (1875), L. R. 10 Ex. 337). It is now settled that the latter doctrine applies also to English documents even though under seal.

**Bechuanaland Exploration Co. v. London Trading Bank,**  
[1898] 2 Q. B. 658.

The plaintiffs held debentures of an English company, payable to bearer and under the seal of the company. The plaintiffs kept them in a safe of which their secretary had the key. The secretary pledged the debentures with the defendant bank as security for a loan. The bank took them *bonâ fide*, having recently received from the plaintiffs an assurance that their secretary was absolutely trustworthy:—**Held**, the debentures are negotiable. The defendants have a good title.

Bearer debentures are now recognised as negotiable without the necessity of proving a custom of merchants to treat them as such.

**Edelstein v. Schuler,** [1902] 2 K. B. 144.

Debenture bonds, payable to bearer, were stolen and sold through a broker:—**Held** (BIGHAM, J.), “The time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question. The existence of the usage has been so often proved that it must be taken to be part of the law.”

## SECTION 4.

**Registration of Debentures.**

A debenture need not be registered as a bill of sale, even if it includes chattels, for, by the Bills of Sale Act, 1882, s. 17, debentures of “any mortgage, loan, or other incorporated company” (*r*) need not be registered.

**Re Standard Manufacturing Co.**, [1891] 1 Ch. 627.

It was argued that the debentures of a company must be registered as bills of sale, unless it was a mortgage or loan company or some similar company, *i.e.* that the words “other company” must be construed *ejusdem generis*:—**Held**, the section applies to *all* incorporated companies.

The reason is that sufficient provision is made in the Companies Act for the registration of debentures.

**Debentures must be registered under the Companies Act.**

By sect. 93 every mortgage or charge created by the company (*s*)

- (a) for securing an issue of debentures; or
- (b) charged on uncalled capital; or
- (c) by an instrument which if made by an individual would be a bill of sale; or
- (d) which creates a floating charge; or
- (e) is a mortgage of land (*ss*); or

(*r*) This includes a company registered in Guernsey (*Clark v. Balm, Hill & Co.*, [1908] 1 K. B. 667).

(*s*) If created between January 1st, 1901, and July 1st, 1908, the Act of 1900 applies, which includes only (a), (b), (c), and (d) above. If created after July 1st, 1908, (e) and (f) also apply.

(*ss*) Thus, if a solicitor claims a lien over the deeds of a company for his costs his lien should be registered. So also a contract for sale of land to a company should be registered if the vendor wishes to rely on his lien for unpaid purchase-money.

(f) is a mortgage of book debts,

shall so far as it creates a charge be void as against the liquidator and creditors of the company, unless it be delivered for registration with the registrar within twenty-one days of its creation.

Besides the register kept by the registrar the company must :

- (1) keep a register of mortgages and charges specifically affecting property of the company (sect. 100) ;
- (2) keep copies of all mortgages and charges which have to be registered with the registrar (sect. 93 (9)).

The company usually keeps a register of debenture-holders ; but it is not bound to do so.

In case of a series of debentures the register states—

- (a) the total amount secured ;
- (b) dates of resolutions and deeds (if any) which created the charge ;
- (c) description of the property charged ; and
- (d) names of the trustees (if any) (sect. 93 (3)).

#### Right of Inspection.

(1) The register kept by the registrar must be open to the inspection of any one on payment of not more than 1s. (*t*).

(2) The register of mortgages kept by the company must be open to creditors and members of the company free, and to other persons on payment of not more than 1s. (*u*).

(3) The copies of mortgages registered with the registrar must be open to creditors and members free, but not to other persons (*u*).

(*t*) Companies Act, s. 93 (8).

(*u*) *Ibid.*, s. 101 (1).

(4) The register of debenture-holders (if any) must be open to registered debenture-holders and members of the company subject to any reasonable restrictions (*x*).

Shareholders and debenture-holders are also entitled to require a copy of the register of debenture-holders at 6*d.* per 100 words (*x*), and debenture-holders are entitled to require copies of the debenture trust deed, if any, for 1*s.* if printed, or if not at 6*d.* per 100 words (*y*).

**Effect of Non-Registration.**—If a mortgage or charge is not registered with the registrar it is **void** as to the security, but the obligation to pay the debt remains.

A new mortgage made under the terms of a debenture trust deed which does not increase the total amount secured, need not be registered.

**Bristol Breweries, Limited v. Abbot**, [1908] 1 Ch. 279.

Similarly, separate mortgages of ships to trustees for debenture-holders need not be registered.

**Cunard S.S. Co. v. Hopwood**, [1908] 2 Ch. 564.

The certificate of registration given by the registrar is conclusive.

**Re Yollond, Limited**, [1908] 1 Ch. 152.

The word “**created**” seems to mean “sealed and some of the series issued.”

**Re Spiral Globe, Limited** (No. 2), [1902] 2 Ch. 209.

August, 1900, the company resolved to issue 20 debentures and sealed them. September 24th, 1900, 10 debentures were issued to debenture-holders. January, 1901, the other 10 were issued:—**Held**, the whole issue should have been registered within 21 days after September 24th, 1900.

An agreement to issue debentures usually creates an equitable charge at once.

(*x*) Companies Act, s. 102 (1).

(*y*) *Ibid.*, s. 102 (2).

- (1) If so, the agreement should be registered within 21 days.
- (2) If not, *i.e.* if it is merely an agreement to give a charge in the future, it need not be registered.

But such a transaction is open to suspicion (*Re Jackson and Bassford*, [1906] 2 Ch. 467); and if the charge is created within 3 months before the winding-up, it is void, unless the company was solvent at the time (see p. 244).

**By section 16 of the Act of 1900.**—If debentures were not registered within the proper time, a judge might order the **time for registration to be extended**, provided the default was accidental or due to inadvertence or some other sufficient cause or not such as to prejudice the position of creditors or shareholders, or on any other grounds which might be just and equitable.

Applications to the court to extend the time were numerous shortly after the Act of 1900 was passed, owing to ignorance of the Act and doubts as to when debentures were “created.” The necessity for an application to the court could, however, generally be avoided by cancelling debentures which have been issued without proper registration, and issuing new ones in their place (see *Defries & Co., Limited*, [1904] 1 Ch. 40). But now there is the risk that such debentures may be void if the company is wound up within 3 months, and the power to give relief may become more important.

The effect of this section still remains, although it has been repealed by the Companies Act, 1908.

**Herts and Essex Waterworks, Limited**, [1909] W. N. 48.

The order must be made “without prejudice to the rights of parties acquired prior to the time of actual registration.”

**Re Spiral Globe, Limited**, [1902] 1 Ch. 396 (z).

(z) And see *Re I. C. Johnson & Co., Limited*, [1902] 2 Ch. 101.

The effect of such a clause is not so great as appears at first sight; for an ordinary unsecured creditor does not “acquire any rights” against the property of the company until the company commences to be wound up.

Thus—

- (1) If the debentures are registered before a winding-up has commenced, the debenture-holders have priority over the unsecured creditors (*a*) (*Re Ehrmann Bros., Limited*, [1906] 2 Ch. 697).
- (2) If the debentures are registered after a winding-up has commenced, the unsecured creditors rank equally with the debenture-holders (*Re Anglo-Oriental Carpet Co.*, [1903] 1 Ch. 914).

The application may be made either by summons or by motion in the Chancery Division.

## SECTION 5.

### Transfer of Debentures.

Debentures to bearer are transferred by simple delivery.

Debentures to registered holder are transferred in the manner specified in the conditions indorsed thereon.

The form is generally similar to a transfer of shares (see p. 95, *ante*). If no form is specified, they may

(*a*) If, therefore, the position of the unsecured creditors is likely to be seriously affected, they should have an opportunity of being heard before the order is made (*Cardiff Workmen's Cottage Co., Limited*, [1906] 2 Ch. 627). The consent of the principal creditor was required in *Herts & Essex Waterworks Limited*, [1909] W. N. 48.

be assigned, like any other chose in action, by writing signed, with written notice to the company.

Debentures are transferable unless the contrary is agreed, subject to all equities, *e.g.*, after a resolution to wind up the company a shareholder can only assign his debentures subject to his liability for calls due on his shares.

**Re China Steamship Co.** (1869), L. R. 7 Eq. 240.

Low held sixty shares in the company, and five debentures. The company was wound up, and Low assigned his debentures to M. Later, calls were made on the sixty shares: **Held**, M. took the debentures subject to the company's claim for calls. And see *Athenæum Society v. Pooley* (1858), 3 De G. & J. 294 (see p. 151).

But this is not so if the debentures are negotiable (see p. 157, *ante*), or if the debtor company has precluded itself from setting up such equities (*b*).

**Re Goy & Co.**, [1900] 2 Ch. 154.

The debentures contained a clause that the principal and interest would be paid to any transferee without regard to the equities between the company and the transferor. A resolution was passed to wind up the company. C., a director, then transferred his debentures to R. C. had been guilty of misfeasance towards the company, but R. did not know this:—**Held**, R. takes, free from the company's claim against C.

But where the assignee is only a trustee for the assignor or his creditors, the company can enforce the equities against the transferee.

**Re Brown and Gregory, Limited**, [1904] 1 Ch. 627.

S. & Co. owed £1666 to the company, but held debentures in the company. S. & Co. assigned all their property, including the

(*b*) Buckley, pp. 468, 469.

debentures, to P. in trust for their creditors:—**Held**, P. takes the debentures subject to the company's right to set-off the debt of £1666 against the debt due from them and secured by the debentures.

A company can become a transferee of its own debentures (*c*); and the same debentures may be re-issued (*d*), so as to rank *pari passu* with the original issue, unless (1) the articles provide otherwise, or (2) the company is under a contract to redeem the debentures (*e*).

Where there is such a contract redeemed debentures cannot be re-issued (*f*).

## SECTION 6.

### Issue of Debentures (*g*).

Debentures (unlike shares) may be issued at a discount, if this is allowed by the Articles of the company.

The reason is that they do not form part of the capital of the company.

Thus, suppose a company has tried to issue several £100 debentures with interest at four per cent., but they are not taken up; there would be nothing to prevent the company issuing other debentures at five per cent.; but nearly the same result is obtained

(*c*) *Re George Routledge & Sons*, [1904] W. N. 157.

(*d*) As to the effect of the re-issue, on registration of the debentures see *Re New Omnibus Co.*, [1908] 1 Ch. 621. A transfer of a debenture which had been issued under a contract to re-issue the debenture every 14 days, although it apparently avoided the necessity for registration, was held valid, as against the company, in favour of a *bonâ fide* holder for value without notice in *Re Renshaw & Co.*, [1908] W. N. 210.

(*e*) Companies Act, s. 104.

(*f*) *Re Russian Petroleum Co.*, [1907] 2 Ch. 540.

(*g*) For the meaning of the term "issue" of debentures, see *Perth Electric Tramways, Limited*, [1906] 2 Ch. 216 at p. 219.



by issuing each of the old £100 debentures for £80. The company will then have to pay £4 annually on each £80 lent, which amounts to £5 per cent. Besides this there is the gradual increase in the value of the debentures. Thus if they are to be paid in twenty years, the capital value should increase by about £1 per year, thus in effect further increasing the rate of interest.

**Re Regent's Canal Co. (1876), 3 Ch. D. 43.**

The company issued 100 debentures of £100 each at £95 each. Forty of these were deposited with creditors as security:—**Held**, this was a good charge. The validity of the issue was not disputed (*h*).

On winding-up, the company's power to issue debentures ceases. But the company can allot the rest of a series already issued at any time before winding-up, even after an action has been commenced by debenture-holders to enforce their security.

**Hubbard & Co., W. N. (1898) 158.**

Some of the debentures of an issue were not taken up. The interest fell in arrear. The debenture-holders commenced an action for a receiver. The company allotted some of the remaining debentures of the series to its solicitor as security for the costs of the defence:—**Held**, the issue was good, as the receiver had not yet been appointed.

If money is advanced to the company under an agreement that debentures shall be issued, this creates a charge at once in equity.

**Pegge v. Neath, etc., Co., [1898] 1 Ch. 183.**

The company borrowed money from P. and gave him a promissory note, and undertook to issue to P., when called on, second mortgage debentures to that amount. An action was brought by the first and some of the second debenture-holders to enforce their

(*h*) And see *Mosely v. Koffyfontein Mines*, [1904] 2 Ch. 108.

security, and they obtained judgment. Then P. claimed to have his second debentures issued to him :—**Held**, P. is in equity a holder of second mortgage debentures to the amount of his debt.

Specific performance of an agreement to give debentures may be enforced against a company: and the company can specifically enforce against another person an agreement to **take** debentures (i).

Before the Act of 1907 the latter agreements could not be specifically enforced.

**South African Territories, Limited v. Wallington,**  
[1898] A. C. 309.

The company issued a prospectus for 1500 debentures of £50 each, payable as to ten per cent. on application, and the rest by instalments. W. signed an application form for sixteen debentures, and paid £80, and thereby agreed to take sixteen debentures on the terms of the prospectus. The company allotted the debentures, but W. refused to pay anything further. The company claimed (1) specific performance; (2) damages :—**Held** (Lord HALSBURY), “The real nature of the transaction is an agreement by the applicant to lend money at certain interest.” You **cannot get specific performance of a contract to lend money**. But an action for damages for breach of contract will lie.

## SECTION 7.

### Remedies of Debenture-holders.

A debenture-holder who wishes to realise his security and get his money back, may make use of all or any of the following remedies.

1. He may sue on behalf of himself and all other debenture-holders to obtain payment or to **enforce his security by sale**. The court then appoints a receiver and (if necessary) a manager (see p. 153), and declares

(i) Companies Act, s. 105.

the debentures to be a charge on the assets of the company, directs inquiries as to who are debenture-holders, etc., and orders a sale of the property (*k*).

The holder of one of a series of debentures cannot sell the property charged unless the debenture contains an express power of sale. *Blaker v. Herts and Essex Waterworks* (1889), 41 Ch. D. 406.

Any surplus proceeds of sale after payment of the principal, interest, and costs due to debenture-holders is payable to the company (*l*).

2. He may **appoint a receiver**, if the conditions give him power to do so (see pp. 145 and 151).

3. The court may authorise the **receiver to borrow money** to be a first charge on the property of the company in priority to all the debentures, if it is required for the purpose of preserving the business.

**Greenwood v. Algesiras**, [1894] 2 Ch. 205.

The court allowed the receiver to borrow £10,000 for the repair of landslips on a Spanish railway: for if they had not been repaired, the Government would have declared the railway forfeited for discontinuance of traffic.

The claims of the persons who lend the money will

(*k*) **Note as to procedure.**—The company frequently consents to such an application; if so, an order is first made appointing a receiver, and later a sale is ordered on a motion for judgment (see *Griggleson Coal Co.*, [1906] W. N. 20). For this purpose a statement of claim should be prepared (*Re Dupont*, [1906] W. N. 14), and should be supported by evidence. The statement of claim can only be dispensed with if the company consents to the order. (*Re Kitson Empire Co.*, [1910] W. N. 154). For the form of the order, see *Griggleson Coal Co.* (*ubi sup.*).

(*l*) As to the order of payment, see *Calgary & Medicine Hat Co.*, [1908] 2 Ch. 652.

then have priority over the claims of the debenture-holders (*m*), but will be postponed to the receiver's right of indemnity (*n*).

Leave to borrow money in this way will only be granted where there is clear evidence of advantage.

**Securities Investment Corporation v. Brighton Alhambra**  
(1893), 68 L. T. 249.

The receiver appointed by debenture-holders of a music hall had already borrowed £1000, and had carried on the business for some time at a loss. He applied for leave to borrow another £1000, in order to sell the business as a going concern:—**Held**, leave will not be granted, for this is a mere speculation.

If the receiver exceeds the amount authorised, his right of indemnity does not extend to the excess, even if he acted *bonâ fide*, unless it was reasonably necessary for him to borrow without applying to the court (*Re British Power, etc., Co., Limited*, [1906] 1 Ch. 497) (*o*).

4. The debenture-holder may apply to the court for **foreclosure**, which may extend even to the uncalled capital of the company (*Sadler v. Worley*, [1894] 2 Ch. 170).

But this remedy is not usual, as it is necessary for all the debenture-holders of every class to be parties to the action.

**Elias v. Continental Co.**, [1897] 1 Ch. 511.

Four out of five debenture-holders sued for foreclosure:—**Held**,

(*m*) *Re Glasdir Copper Mines, Limited*, [1905] W. N. 172.

(*n*) *A. Boynton, Limited*, [1910] 1 Ch. 519. As to priorities where default is set off against indemnity see *Re British Power Traction Co.*, [1910] W. N. 194.

(*o*) And S. C., [1907] W. N. 49 as to what was authorised in that case.

where the legal estate is in the mortgagees and foreclosure means simply depriving the mortgagor of his equity of redemption, it is not necessary for all parties to be present: but where it involves **conveying the property of the company to the mortgagees**, they must all be present.

5. He can present a petition for winding up the company, as he is a creditor (see p. 217).

6. He may have the property sold, if the debenture trust deed gives the trustees a power of sale.

7. If the company is insolvent, and his security is insufficient, he may value his security and sue for the balance of his debt or give up his security and sue for the whole debt.

The proceeds recovered by any of these means may be applied by the debenture-holder in payment of his costs, principal debt and interest, but not interest which became due after winding up.

A plaintiff who sues on behalf of himself and all other debenture-holders of the same class, has a first claim against the proceeds for his costs.

A second debenture-holder who is made a party gets his costs only out of the surplus (if any) after payment of the first debentures (*p*).

The amount of costs that he may recover depends on a rule, at first sight rather curious.

- (1) If the assets are **insufficient** to pay the debentures of his class in full, he gets solicitor and client costs.
- (2) If the assets are sufficient to pay the debentures of his class in full, but not sufficient to pay

the subsequent debentures, he only gets party and party costs (*q*).

The reason of this is that in the first case the costs come entirely out of the pockets of the persons whose rights he has been enforcing; while in the second, they come out of the residue of the fund which is going to persons not benefited by his exertions (*r*).

(*q*) But if the plaintiff cannot pay to his solicitor the difference between party and party costs and solicitor and client costs, the solicitor has a lien on the property recovered in the action for the difference (*Re W. C. Horne & Sons, Limited*, [1906] 1 Ch. 271; and see form of order on p. 277).

(*r*) *New Zealand Midland Rail. Co.*, [1901] 2 Ch. 357; and see *Re Clayton Engineering Co.*, [1904] W. N. 28.

## CHAPTER XIII.

## UNDERWRITING.

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AN underwriting agreement is an "agreement whereby, previously to an offer of a company's shares to the public for subscription, some person undertakes, in consideration of a commission, to take the whole or a portion of such (if any) of the offered shares as may not be subscribed for by the public" (Rawlins and Macnaghten, p. 220).

Similar agreements may be made for underwriting debentures.

When a company offers a number of shares to the public, it is very often most important to secure that the whole issue shall be taken up. Even if the shares are almost certain to be taken, unforeseen events may happen, such as the outbreak of war or attacks against the company in the newspapers, which would endanger the success of the issue.

Consequently, a company is usually willing to pay a small commission on all the shares offered to the public to any one who will agree to take all the shares (if any) that the public do not take.

**Brokerage** is rather different. If the company agrees with A. that if he takes so many shares, the company will allow him a commission of £2 per cent., this may amount to issuing shares at a discount; but if A. is a

broker, and employed as such by the company for **placing** shares, a proper commission or "brokerage" may be paid.

A person who "**places**" shares does not take them himself, but finds other persons who will take them.

A reasonable brokerage has always been allowed.

**Metropolitan Coal Association v. Scrimgeour,**  
[1895] 2 Q. B. 604.

A payment of two and a half per cent. to brokers was held to be valid.

Underwriting commission may only be paid under certain conditions. By section 89 of the Companies Act no company may apply any of its shares or capital, either directly or indirectly, in the **payment of any commission, discount or allowance** to any person in consideration of his subscribing or agreeing to subscribe for or procure subscriptions for any shares unless—

- (1) the payment of the **commission is authorised in the articles**,
- (2) the payment does not exceed the amount or rate authorised, and
- (3) the amount or rate agreed to be paid is **disclosed in the prospectus** or statement in lieu of prospectus (*a*).

Sometimes the underwriter enters into subsidiary contracts with other persons to relieve him of some of his liability for a commission. This is called "sub-underwriting." The commission paid to sub-underwriters need not be disclosed in the prospectus (*b*).

(*a*) This section does not affect the power to pay brokerage s. 89 (3).

(*b*) S. 81 (1) (h).



The result is that a company cannot apply its capital or shares in the payment of underwriting commission except in the manner mentioned in the Act.

This provision has been used as an indirect way of issuing shares at a discount.

Thus, the company agrees to pay to every person who subscribes for one £1 share the sum of 5s. by way of commission.

It is, however, exceedingly doubtful whether such a scheme is legal, and if it is really nothing more than an issue of shares at a discount it would probably be void (see *Keatinge v. Paranga Mines, Limited*, [1902] W. N. 15).

There is a distinction between payment of a "commission" and "discount." The word "commission" seems to imply some service to the company beyond the mere agreement to take up shares in return for the company's agreement to allot them (see also *Shorto v. Colwill*, [1909] W. N. 218, and *Barrow v. Paranga Mines, Limited*, [1909] 2 Ch. 658.)

It was at one time thought that the Act prevented a company from giving as the consideration for underwriting shares, an option to take further shares at par (c). This has now been held to be legal.

**Hilder v. Dexter**, [1902] A. C. 474.

Shares were offered to fourteen persons on the terms that for each share taken up, the applicant should have an option of taking within a year one other share at par (c); and if he should take up this share within the year, then he should have a further option of taking up another share at par within the next year:—**Held**, this is valid. The company is not applying "any of its shares or capital," and is not paying "a commission, discount or allowance." The result is, in any case, that the company gets "par" for the shares.

Before the Act of 1907 the payment was only allowed on an offer of shares to the public (d).

(c) Taking a share at "par" means, giving £100 for a £100 share. To give less, is to take at a **discount**; to give more, is to take at a **premium**.

(d) See *Booth New Afrikaner Co.*, [1903] 1 Ch. 295, and *Sherwell v. Combined Incandescent Syndicate, Limited*, and notes thereto on p. 209.

The contract usually takes the form of an underwriting letter, which may be either—

- (1) An offer, which does not become binding until the company communicates its acceptance (*e*).

**Ex parte Stark** (1897), 1 Ch. 575.

S., by letter, offered to subscribe or find securities for 10,000 shares, or so many as the company should agree to issue to him :—**Held**, this was merely an offer.

Or,

- (2) An acceptance of the terms offered by the company.

**Carmichael's Case**, [1896] 2 Ch. 643.

C. signed a letter agreeing to take 1000 shares in consideration of a certain commission :—**Held**, this was a complete contract.

The payment may be made direct by the company or by the person to whom the shares are allotted (*f*).

The amount of commission paid in respect of shares and debentures must be stated in the annual summary, and the rate of commission paid in respect of debentures must be entered in the register of mortgages kept by the registrar (*g*), and in every balance sheet of the company until the amount paid has been written off (*h*).

(*e*) And see *Ormerod's Case*, [1894] 2 Ch. 474. where the agreement was to take shares “if and when called upon.”

(*f*) Companies Act, s. 89.

(*g*) Companies Act, s. 93 (4)

(*h*) Companies Act, s. 90.

## CHAPTER XIV.

## DIRECTORS.

## SECTION 1.

## Position of Directors.

A COMPANY need not have directors (*a*). All the members together might carry on the business, or there might be a "council"; but a company usually appoints a certain number to be managers of the business, to make contracts for the company, and to take care of the property of the company, and they are generally called directors. Thus, directors are sometimes said to be (1) **Trustees**, and sometimes (2) **Agents or managers**. Their exact position is hard to define.

(1) The directors are to some extent **trustees for the company**. Thus, the Statute of Limitations applies to their actions in the same way as to trustees.

**Re Lands Allotment Co.**, [1894] 1 Ch. 616.

The company had no power to invest in shares of other companies. The directors invested £35,000 in shares of the Building Securities Co. in 1885. The company was wound up in 1893, *i.e.* more than six years later:—**Held**, the directors were protected under the Trustee Act, 1888, as there was no fraud (also they were not liable as the shares were taken in payment of a debt).

(*a*) Or the sole director may be a limited company (*Re Bulawayo Co.*, [1907] 2 Ch. 460).

Directors are trustees for the company of their power of approving transfers, issuing and allotting shares (*b*), and making calls.

**Alexander v. Automatic Telephone Co.**, [1900] 2 Ch. 56.

For facts, see p. 107 above.

LINDLEY, M.R.: "The Court of Chancery has always exacted from directors the observance of good faith towards shareholders . . . and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits, and must account for them to the company."

Directors are trustees for the company and not for the individual shareholder.

**Percival v. Wright**, [1902] 2 Ch. 421.

Directors bought shares from a shareholder while they were negotiating for the sale of the company at a very high price, but did not tell him of this fact:—**Held**, the sale was good.

But directors do not have to account so strictly as the trustees of, *e.g.*, a marriage settlement, and in many ways they differ from ordinary trustees.

**Smith v. Anderson** (1880), 15 Ch. D. 275.

JAMES, L.J.: "A trustee is a man who is the owner of property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee. . . . The office of a director is that of a paid servant of the company. A director never enters into a contract for himself, but for his principal . . . he cannot sue on such contracts, nor be sued on them (unless he exceeds his authority)."

Directors are described as trustees, agents, or managing partners, not as exhausting their powers or

(*b*) **Punt v. Symons & Co., Limited**, [1903] 2 Ch. 506.

responsibilities, but as indicating useful points of view. “It does not matter much what you call them, so long as you understand what their true position is, which is that they are merely commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it” (JESSEL, M.R., 10 Ch. D. 452).

(2) Directors are **agents for the company**. When they make contracts for the company, they are not liable themselves, unless they contract in their own names; then the other party can sue either the company or the directors, at his option.

Even if they make a contract which is *ultra vires*, and so cannot bind the company, the directors do not render themselves liable (except sometimes on an implied warranty of authority). See *Weeks v. Propert*, p. 137.

If the act done is not beyond the powers of the company, but only beyond the powers of the directors, then—

(1) If the contract is made with a member, it is voidable.

(2) If made with an outsider who had no notice of the want of powers, it binds the company.

Such an act of directors may also be made valid by the acquiescence of **every** shareholder (c).

(c) Rawlins and Macnaghten, p. 483.

## SECTION 2.

**Appointment of Directors.**

**The first directors are usually named in the Articles.**—This is not now a valid appointment unless each of the proposed directors has—

- (i.) signed and filed with the registrar a consent to act as director ; and
- (ii.) signed the memorandum for his qualification shares or a contract to take them from the company and pay for them (*d*).

If not named in the Articles, the first directors are appointed by the subscribers to the Memorandum. This must be done either —

- (1) by the **majority at a meeting** of subscribers ;  
or
- (2) by a writing signed by **all** the subscribers.

If they do not meet, **all** the subscribers must sign the appointment, unless the Articles provide otherwise. See—

**John Morley Building Co.**, [1891] 2 Ch. at p. 392, and **Re Great Northern Salt Works** (1890), 44 Ch. D. 472.

The company adopted Table A. (see p. 45 *ante*), which contains no provisions on this subject. A meeting of three of the seven subscribers appointed A., B., C., and D. as directors. Later, all seven subscribers signed a document appointing A., B., C., and E. as directors:—**Held**, the first appointment was bad, the second good.

A company must keep a register of its directors, and send copies of the register to the registrar and must

(*d*) Companies Act, s. 72.

also notify to the registrar any change among its directors (*e*).

### SECTION 3.

#### Quorum.

A **quorum** is the number of directors who must be present at any meeting.

The **minimum number** is the number of directors who must be holding office at any time.

If a **minimum number** of directors is fixed by the Articles, and the number falls below the minimum, the remaining directors cannot act. But the Articles may authorise the directors to act in spite of a vacancy.

#### Re Bank of Syria, [1901] 1 Ch. 115.

By the Articles the affairs of the company were to be conducted by a council of not less than three. Article 42 allowed the Council to act in spite of a vacancy. The numbers of the council were reduced to two. The remaining two gave certain securities:—**Held**, these securities would have been void, but were saved by clause 42.

The **quorum** of directors is usually fixed by the Articles. A quorum may be defined as “The number of directors **qualified to act** who must be present at a meeting to enable them to act as a board.”

#### Re Greymouth Point Elizabeth Railway, [1904] 1 Ch. 32.

The Articles contained a clause the same as Article 86 (on p. 41), and two directors were to be a quorum. There were only three directors: two of these lent £2000 to the company, and the board (*viz.*, the three directors) agreed to give them debentures to secure it. Thus, though three directors were present, two were disqualified from voting under Article 86:—**Held**, the agreement was void.

(*e*) Companies Act, s. 75.

If no quorum is fixed by the Articles, the number of directors who usually act will be sufficient; but in any case, notice of the meeting must be given to **all** the directors.

#### SECTION 4.

#### Qualification.

There need not be any qualification for directors, but the Articles usually provide that no person shall act as director unless he holds a certain number of shares. See Art. 84 on p. 40 above.

If any qualification is fixed, then—

- (1) It must be **disclosed in the prospectus** (*f*);
- (2) Each director **must take his qualification shares within two months** of his appointment, otherwise he vacates office, and renders himself liable to a fine of £5 for every day that he acts as director (*g*);
- (3) The **company cannot commence business until every director has taken up his qualification shares** and paid on them, if payable in cash, the same proportion as the public have to pay on application and allotment (*h*).

The Articles frequently provide that the qualification of a director shall be the holding of a certain number of shares “in his own right.” It would perhaps be better to provide that he must hold them “beneficially,” for the former words are satisfied if the director holds the shares as “trustee for others” (*i*),

(*f*) Companies Act, s. 81 (1) (b).

(*g*) *Ibid.*, s. 73.

(*h*) Companies Act, s. 87.

(*i*) *Howard v. Sadler*, [1893] 1 Q. B. 1. In such a case the dividends on the shares belong to the beneficiaries, but the remuneration of the director or trustee belongs to him (*Re Dover Coal-Field, Limited*, [1908] 1 Ch 65).



unless it appears on the register that he is merely a trustee.

**Boschoek Proprietary Co. v. Fuke**, [1906] 1 Ch. 148.

A director was entered on the register as the holder of shares as liquidator of another company :—**Held**, he was not qualified.

And the director must hold the shares in such a way that the company may safely deal with him as owner of the shares.

**Sutton v. English & Colonial Co.**, [1902] 2 Ch. 502.

The qualification of a director was the holding of 100 shares "in his own right." S., a director held 1000 shares. S. became bankrupt; his trustee in bankruptcy gave notice to the company that he claimed the shares, but did not wish to be registered for a few days. The board of directors excluded S. as being disqualified :—**Held**, S. was disqualified.

Shares which are held by a director jointly with any other person may be a sufficient qualification (*k*).

If a director takes his qualification shares as a present from the promoters, this is a breach of trust, and he must account to the company for the amount.

**Hay's Case** (1875), 10 Ch. App. 604.

The directors agreed with Hay, that if he would become a director they would give him forty £25 shares as his qualification. The promoters then paid Hay £1000. Hay then applied to the company for the shares, and paid £1000 for them :—**Held**, Hay holds the £1000 as trustee for the company.

### Disqualification and Removal.

A director becomes disqualified if he loses his qualification, or if he does any act which, by the Articles, amounts to a disqualification (see Art. 85 on p. 40),

(*k*) *Grundy v. Briggs*, [1910] W. N. 17.

*e.g.*, to hold a paid office under the company such as a paid trustee of a debenture deed (*Astley v. New Tivoli*, [1899] 1 Ch. 151).

“Absenting himself,” as in clause 85 (c) (p. 41, above), refers only to voluntary absence.

**Mack’s Claim**, [1900] W. N. 114.

A director who lived in Belfast was seriously ill and unable to travel, and failed to attend several meetings:—**Held**, he did not vacate his office.

When the disqualification consists in “making a secret profit,” the disqualification ceases as soon as the transaction is complete.

**Re Bodega**, [1904] W. N. 7.

W., one of the directors, made a secret profit in 1900. He was re-elected in 1901. In 1902 the secret profit was discovered:—**Held**, the disqualification ceased as soon as it became complete in 1900, and the re-election in 1901 made him a director again.

A disqualified director ceases to be a director, and therefore cannot act. If he does act, the company may restrain him from doing so by injunction, but cannot sue him for damages.

An individual shareholder cannot take any proceedings against him for acting; for an individual shareholder cannot, as a rule, sue to redress a wrong done to the company. This is the rule in *Foss v. Harbottle* (1843), 2 Ha. 461.

**Burland v. Earle**, [1902] A. C. 83.

Directors instead of paying profits to shareholders invested them:—**Held**, To redress a wrong done to the company the action should be brought by the company itself, except where the persons against whom relief is sought hold the majority

of the shares and will not allow the company to bring an action; and even then, only in cases of fraud and *ultra vires*, and not for mere informalities (*l*).

The Articles generally contain a clause that if it shall afterwards appear that the directors were disqualified, or improperly elected, any acts done by them shall be valid in spite of the disqualification. See Art. 99 on p. 42.

This applies both to dealings with outsiders and to dealings with the members of the company.

**British Asbestos Co. v. Boyd**, [1903] 2 Ch. 439.

B., R., and M. were directors. Two formed a quorum. The Articles contained the same clause as Article 99 (on p. 42), and it was a disqualification to hold any office of profit in the company. M. resigned. B. became secretary for two months, and was therefore disqualified. During that time B. and R. appointed D. as director. The appointment of D. was disputed:—**Held**, D's appointment was valid. Article 99 (together with Companies Act, 1862, section 67, now section 71) covers cases where the facts causing disqualification were known at the time, but the knowledge was not present to the minds of the directors. Also, this clause applies to a question of internal management, such as the appointment of a director.

A director who has resigned cannot withdraw his resignation (*m*).

A director who is unsatisfactory may be removed by the company, but the power of removal is governed entirely by the Articles (*n*).

If there is no such power in the Articles, the company may give itself the power by special resolution.

(*l*) As to the use of the company's name see *Normandy v. Ind Coope, Limited*, [1903] 1 Ch. 84; and *Marshall's Valve Co. v. Manning & Co.*, [1909] 1 Ch. 267, where the solicitor was held personally liable to pay the costs.

(*m*) *Glossop v. Glossop*, [1907] W. N. 170.

(*n*) *Browne v. La Trinidad*, [1887] 37 Ch. D. 1.

## SECTION 5.

**Remuneration of Directors.**

The remuneration of the directors (if any) must be stated in the prospectus (*o*).

Directors are not entitled to any remuneration apart from express agreement.

The Articles usually provide for their remuneration; if so, it cannot be changed or increased without a special resolution (*p*).

Directors cannot get their travelling and other expenses in addition to their remuneration, unless this is expressly provided for (*q*).

If the Articles provide for remuneration, it becomes a debt due from the company to the directors, and may be sued for, and may be paid out of capital if there are no profits.

**Re Lundy Granite Co. (1872), 26 L. T. 673.**

The remuneration was to be one-tenth of the profits, but not less than £100 a year. There were no profits for several years:—**Held**, the directors were entitled to £100 a year.

When a company is making no profits, the directors frequently agree to waive their remuneration, but they are not bound to do so.

If the remuneration is to be “at the rate of £— a year,” a director who acts for **part** of a year is entitled to a proportionate share of remuneration; but if it is to be “a yearly sum of £—,” or even “£—per annum,”

(*o*) Companies Act, s. 81 (1) (b).

(*p*) *Boschoek Co. v. Fuke*, [1906] 1 Ch. 148.

(*q*) *Young v. Naval, Military, etc., Limited*, [1905] W. N. 41.

he will not get anything in any year unless he acts for the whole year.

**Inman v. Ackroyd and Best, Limited**, [1901] 1 K. B. 613.

The remuneration was to be "the sum of £125 per annum per director." I. served for one year and seven months:—**Held**, if it had been "at the rate of" £125 per annum, I. would be entitled to be paid for one year and seven months. But in this case he is only entitled to be paid £125 for the one complete year.

If a director is a trustee of his qualification shares, he may retain his remuneration for himself (*r*).

## SECTION 6.

### Powers of Directors.

The powers of the directors are generally described in the Articles, and there is usually a clause giving them powers of management and all the powers of the company which are not otherwise dealt with. See Art. 106 on p. 42.

This general clause is not to be construed "**ejusdem generis**," but is valid and effectual.

**Re Pyle Works (No. 2)**, [1891] 1 Ch. 173.

Two directors of the P. Company gave a guarantee to a railway company, by reason of which the railway company agreed to carry goods on credit for the P. Company. The board of the P. Company therefore agreed that it should indemnify the two directors by a charge on its uncalled capital. The **Articles** only gave directors power to secure money when **borrowed**. The **Memorandum** gave the **company** power to issue securities generally. The Articles contained clause 106 (on p. 42):—**Held**, the directors have power to give this charge.

The directors are the only persons who can deal with the matters thus assigned to them, and their decision cannot be

(*r*) *Re Dover Coal Field, Limited*, [1907] W. N. 119.

overruled even by a general meeting of the company (s), unless the Articles are altered by a special resolution, or unless the directors are acting in their own interests against the interests of the company (t). They should, however, communicate their policy to the shareholders, and are bound to do so, if their policy is attacked by any of the shareholders (u).

The shareholders may enlarge the powers of the directors, and so enable them to do anything that the company could do; or, if the directors do some act beyond their powers, the shareholders may ratify their act, if it is within the powers of the company.

**A director cannot make a contract with the company**, otherwise there would be a conflict between his own private interest and his duty to the company.

Any such contract will be held to be void, without any inquiry as to its fairness.

**Parker v. McKenna** (1874), 10 Ch. App. 118.

S. agreed to take 9000 shares on certain terms by which he was to pay £30 premium down, and the rest by instalments. The directors took over part of his bargain and released him from some of its terms:—**Held**, this was a contract in which it was important for the directors to watch the interests of the company. Therefore the contract with them was void, and they must refund the profit made on the shares.

There are two exceptions to this rule—

- (1) A director may agree to take shares or debentures of the company.
- (2) The Articles may modify the rule and allow a director to make contracts with the company,

(s) *Automatic Filter Co. v. Cunninghame*, [1906] 2 Ch. 34; *Salmon v. Quin & Axtens, Limited*, [1909] 1 Ch. 311.

(t) *Marshall's Valve Gear Co.*, [1909] 1 Ch. 267.

(u) *Peel v. London & North-Western Rail. Co.*, [1907] 1 Ch. 5.

provided, *e.g.*, that he does not vote See Art. 86 on p. 41.

This does not prevent him from voting on the same question at a meeting of shareholders (*x*).

The directors must act at a meeting (called a “**board meeting**”) unless the Articles give them power to act otherwise. The meeting must be duly summoned; that is, due notice of the meeting must be given to every director. The meeting may be held anywhere, *e.g.*, in a passage (*y*).

The decisions of the directors take the form of **resolutions**, *e.g.*, “Resolved that shares Nos. — to — be allotted to —,” etc.

Minutes of the meetings are kept and signed by the chairman.

Directors may not delegate their powers unless the Articles expressly give them power to do so.

**Re Liverpool Household Stores** (1890), 59 L. J. Ch. 624.

Directors, under powers expressly given by the Articles, delegated all their powers to a committee of three. This was recognised as valid.

The powers of directors cease on the commencement of a winding-up.

## SECTION 7.

### Liability of Directors.

Directors are not personally liable on the contracts which they make as agents for the company, but they may be liable—

(*x*) *North-West Transportation Co. v. Beatty*, [1887] 12 A. C. 589.

(*y*) *Smith v. Paranga Mines*, [1906] 2 Ch. 193.

- (1) on an implied warranty of authority (see p. 137);
- (2) to persons who subscribe for shares, in case of untrue statements in the prospectus (z) see p. 60); or
- (3) to the company in case of **gross negligence**.

**Merchant's Fire Office v. Armstrong**, [1901] W. N. 162.

Directors voted £15,000 to one of their number for "services," whereas he had only rendered the ordinary services of a director:—**Held**, this is gross negligence, and they are liable.

It is not necessary to prove fraud, where directors have applied capital in payment of objects **ultra vires**, *e.g.*, in the payment of dividends out of capital (*Masonic Co. v. Sharpe*, [1892] 1 Ch. 154, at p. 165).

But if they act within their powers in the **bonâ fide** exercise of their discretion they are not liable, and the burden of proof lies on those who seek to charge them with bad faith.

**Re New Mashonaland Co.**, [1892] 3 Ch. 577.

The directors agreed to lend £1250 to G., on his giving security. Cheques were paid to G. at once, but he never gave security:—**Held**, this is a doubtful case, but the burden of proof lies on the plaintiffs to prove fraud, and they have not done so. The directors are not liable, as they have acted in their discretion.

A director is not liable if he can show that he acted without knowledge of the facts which made his act illegal, provided he was not guilty of negligence (*a*). And in any case if he has acted honestly and reasonably and ought fairly to be excused, *the court can relieve him* from liability (*b*).

(z) Companies Act, s. 84.

(a) *Dovey v. Cory*, [1901] A. C. 477.

(b) Companies Act, s. 279.



A director who habitually abstains from board meetings may become liable for the acts of his co-directors. But he is not bound to attend all board meetings.

**Re Denham & Co.** (1883), 25 Ch. D. 752.

All the powers of management were vested in D. C., one of the directors, did not attend the board meetings as a rule. Dividends were paid for four years out of capital. C. himself on one occasion moved a resolution for a dividend at fifteen per cent. :—**Held**, C. was not liable.

A director who signs cheques makes himself liable if the cheque ought not to have been paid (*c*).

The procedure by which a director may be made liable is by misfeasance summons under section 215 of the Companies Act.

If one of several directors has been made to pay for misfeasance, he is entitled to contribution from the others.

**Ashurst v. Mason** (1875), L. R. 20 Eq. 225.

B., a director, held 250 shares with nothing paid. He resigned. His shares were, by a resolution of the directors, transferred to A., one of the directors, in trust for the company. This, of course, was illegal. The company was wound up, and A. had to pay in full :—**Held**, all the directors are liable to contribute their shares of this loss.

This case was followed and explained in

**Jackson v. Dickinson**, [1903] 1 Ch. 952.

which should be read.

The same rule applies to his liability under the section 84 of the Companies Act, and even though some of the directors are dead (*d*); but not if he has been guilty of fraud and the others have not (*e*).

(*c*) Rawlins and Macnaghten, p. 259.

(*d*) *Shephard v. Bray*, [1906] 2 Ch. 235; but see S. C., [1907] 2 Ch. 571.

(*e*) Companies Act, s. 84 (4).

Directors may also become liable for penalties if they do not comply with certain of the provisions of the Companies Act which include

- (1) Keeping a register of members (s. 25, penalty £5 per day).
- (2) Making an annual list and summary (s. 26, penalty £5 per day).
- (3) Sending to the registrar notice of conversion of shares into stock or of consolidation or division of shares (s. 42, no penalty specified).
- (4) Calling a general meeting every year within the proper time (s. 64, penalty £50).
- (5) Sending in a proper report before the statutory meeting (s. 65, no penalty expressed).
- (6) Sending in a proper return of allotments (s. 88, penalty £50 per day).
- (7) Sending to the registrar copies of special and extraordinary resolutions (s. 70, penalty £2 per day).
- (8) Keeping a register of directors and notifying changes in the board (s. 75, penalty £5 per day).
- (9) Stating in every balance sheet the amount paid by way of underwriting commission until written off (s. 90, no penalty expressed).
- (10) Keeping registers of mortgages and charges and allowing inspection (ss. 93, 100 (fine £50), 101 (fine £5), 102 (fine £5)).

It is usually the duty of the secretary of the company to make himself acquainted with all the details of the Companies Act, and to see that the directors comply with its requirements.

## CHAPTER XV.

### MEETINGS AND RESOLUTIONS.

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#### SECTION I.

#### Meetings.

MEETINGS of shareholders are of three kinds :

(1) **Statutory meeting.**—A company must hold a general meeting within not less than one month and not more than three months from the date at which it is entitled to commence business<sup>(a)</sup>. This meeting is called the **statutory meeting**. A report must be sent to all the shareholders seven days before this meeting, stating.

(a) the number of shares allotted, how much has been paid up, and the consideration for allotment ;

(b) the cash received by the company for these shares ;

(c) an abstract of the receipts and payments of the company, and an estimate of the preliminary expenses ;

(d) names, etc., of directors, auditors, manager and secretary ;

(e) if any contract is to be submitted to the meeting for modification, then particulars of the contract and the proposed modifications.

A list of members must be produced at the meeting.

This ensures that within a short time from the commencement of a company, all the shareholders shall have a chance of ascertaining the exact position of the company.

(a) Companies Act, s. 65.

The company cannot before the statutory meeting alter the terms of any contract referred to in the prospectus except subject to the approval of the statutory meeting (*b*).

(2) **Ordinary meeting.**—The articles generally provide that there shall be an **annual general meeting**, to be held on a certain date. This is an ordinary meeting. There must be at least one general meeting every calendar year, not more than 15 months after the previous meeting (*c*).

(3) **Extraordinary meeting.**—If there is some business which must or ought to be transacted before the next ordinary meeting, the directors may call an extraordinary meeting.

The holders of not less than one-tenth of the issued shares of the company may at any time compel the directors to call an extraordinary meeting (*d*).

The Articles may extend this power (*e.g.*, by allowing the holders of one-twentieth of the issued capital to requisition a meeting), but they cannot restrict it.

If the directors neglect to call the meeting, the requisitionists may call it themselves. Such a requisition must be signed by the requisitionists, and in case of joint holders of shares all the joint holders must sign (*e*).

All these meetings are general meetings, and similar business may be transacted at all of them.

(*b*) Companies Act, s. 83.

(*c*) *Ibid.*, s. 64, penalty £50.

(*d*) *Ibid.*, s. 66, which also provides for the manner in which the meeting shall be held.

(*e*) *Patentwood Keg Syndicate v. Pearse*, [1906] W. N. 164.

Every member is entitled to notice of a general meeting.

**Smythe v. Darley** (1849), 2 H. L. Cas. 789.

On an election of a treasurer for Dublin by the board of magistrates, notice was not sent to one of the board :—**Held**, the board were a corporate body, and the election was void.

But the Articles nearly always modify this rule, and provide that notices may be sent by post, etc. See Articles 58 and 59 on pp. 37 and 38.

If special business is to be transacted the notice must specify its nature.

**Tiessen v. Henderson**, [1899] 1 Ch. 861.

A notice convening extraordinary general meetings to consider two alternative schemes of reconstruction of the company did not disclose that the directors were strongly interested as underwriters, etc. in one of the schemes :—**Held**, the notice was bad (*f*).

But notices are not construed very strictly.

**Young v. South African Syndicate**, [1896] 2 Ch. 268.

The notice of a meeting stated that the object was to adopt new regulations instead of Table A., but did not set out the contents of the new regulations :—**Held**, this notice was good (*g*).

A meeting once properly convened cannot be postponed by the directors (*h*).

### Quorum.

The quorum for meetings of shareholders is generally fixed by the Articles ; if not, two members at least must be present.

(*f*) And see *Normandy v. Ind Coope*, [1908] 1 Ch. 84.

(*g*) And see *Betts & Co., Limited v. Macnaghten*, [1910] 1 Ch. 430 (a notice that a certain resolution would be passed "with such amendments as shall be determined on at the meeting" was held good).

(*h*) *Smith v. Paranga Mines*, [1906] 2 Ch. 193.

The **chairman** is often appointed by the Articles; if not, each meeting elects its chairman.

If the chairman prematurely closes the meeting, another chairman may be elected.

**National Dwellings Society v. Sykes**, [1894] 3 Ch. 159.

General meeting called to pass the accounts and re-elect directors. The chairman proposed "that the accounts be passed." A shareholder moved an amendment that a committee of inquiry be appointed. The chairman refused to take the amendment. He put the original motion, which was lost, and then dissolved the meeting at once. The shareholders then appointed a new chairman and appointed a committee of inquiry: **Held**, these appointments were good.

But the chairman has a discretion, and every shareholder is not entitled to talk as much as he likes.

**Wall v. London Assets Corporation** (1898), 14 T. L. R. 496

After a long discussion, several members still wanted to speak, the chairman moved that "the question be now put," and the resolution was passed:—**Held**, the resolution was properly passed.

**Votes.**—Each shareholder has one vote, either on a show of hands or on a poll. But the Articles usually modify this rule, and make the voting power depend on the number of shares held.

The method of voting is as follows: The chairman first takes a show of hands. In this, each member present counts for one only, even if he holds proxies (*Ernest v. Loma Co.*, [1897] 1 Ch. 1). In case of an ordinary resolution, any five members (or the number specified in the Articles) may then **demand a poll**; in case of a special resolution, any three members (or the number, not exceeding five, specified in the articles), may demand a poll (*i*).

(i) Companies Act, s. 69.

The chairman then fixes the time and place for taking the poll. He may declare that it shall be taken then and there, unless the Articles provide otherwise. But he must not declare that it shall be taken in any way inconsistent with the regulations, *e.g.*, by voting papers (*McMillan v. Le Roy Mining Co.*, [1906] 1 Ch. 331).

When the poll is taken, each person voting signs a paper "for" or "against" the resolution, and proxies are counted.

A **proxy** is a writing (stamped 1*d.*) authorising a person to vote for a shareholder at a certain meeting; or it may authorise him to vote at a series of meetings. (If so, it must be stamped 10*s.*)

There is no power to vote by proxy unless it is expressly provided for by the Articles.

The Articles usually provide that proxy papers shall be deposited at the office before the meeting; if not, the person voting is not bound to prove at the meeting his authority to vote, and his vote ought to be accepted, even if he cannot produce the proxy paper at the time.

**Re English, Scottish and Australian Bank**, [1893] 3 Ch. 385.

The bank had its principal business in Australia. A reconstruction scheme was proposed. The judge ordered that proxies from Australian shareholders should be notified by telegraph:—**Held**, the proxies were good, though they could not be produced at the meeting.

If a proxy is given for a particular meeting, the date of the meeting may be filled in afterwards (*k*).

The cost of obtaining the signature of proxy papers may be paid out of the funds of the company (*l*).

If a company is a member of another company, it may appoint a representative to vote (*m*).

(*k*) *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

(*l*) *Peel v. London & North-Western Railway Co.*, [1907] 1 Ch. 5.

(*m*) Companies Act, s. 68.

## SECTION 2.

**Resolutions.**

Resolutions are of three kinds :

1. **Ordinary.**—That is, a resolution passed by a majority of persons present at a general meeting. The resolution is passed in the ordinary way and entered in the minute book by the chairman. The chairman's entry of an ordinary resolution is evidence that it has been properly passed (*n*).

2. **Special resolutions.**—These are necessary for the following purposes among others—

- (a) to alter the Articles of the company ;
- (b) to alter the Memorandum with leave of the Court ;
- (c) to change the name of the company with the consent of the Board of Trade ;
- (d) to reduce the capital with leave of the Court ;
- (e) to sub-divide shares (*o*).

A special resolution necessitates **two meetings**. At the first it must be passed by a **three-quarters majority** of those present. The second meeting must be held not less than fourteen days and not more than one month after the first (*p*). The resolution must be **confirmed** at the second meeting by a **simple majority**.

(*n*) Companies Act, s. 71.

(*o*) Companies Act, s. 41.

(*p*) The resolution will be bad if the second meeting is held less than 14 days after the first (*Railway Sleepers Supply Co.*, 29 Ch. D. 204), or more than one month after the first meeting (*Malleison v. National Insurance Corporation*, [1894] 1 Ch. 200, at p. 206).



**Notice of meeting to pass special resolution.—**

Unless there are express provisions in the Articles (*q*) it is not sufficient to send one notice stating that a second meeting will be held if the resolution is passed at the first meeting (*r*); but the notice may state that the second meeting will be held in any case unless notice to the contrary is given (*s*).

The declaration by the chairman that a special resolution has been carried is “**conclusive**,” unless a poll is demanded (*t*). It was at one time held that “conclusive” meant only “*primâ facie*,” but this is now overruled.

**Re Hadleigh Castle Gold Mines, [1900] 2 Ch. 419.**

A meeting was held to pass an extraordinary resolution (see below) to wind up the company. The chairman declared that it was carried on a show of hands. No poll was demanded. A shareholder afterwards contended that it had not been passed by a three-quarters majority:—**Held**, the chairman’s declaration is conclusive, and the court cannot go into the question.

But the chairman’s declaration will not make a resolution good if the declaration itself shows that it was bad.

**Re Caratal New Mines, Limited, [1902] 2 Ch. 498.**

A special resolution for reconstruction was proposed. The chairman put the question. Then he said, “Those in favour, 6; against, 23; but there are 200 voting by proxy, and I declare the resolution carried”:—**Held**, proxies cannot be counted on a show of hands, therefore the declaration was, on the face of it, illegal, and the resolution was void.

(*q*) *North of England Steamship Co.*, [1905] 2 Ch. 15.

(*r*) *Alexander v. Simpson*, [1890] 43 Ch. D. 139.

(*s*) *Re Espuela Land Co.*, [1900] W. N. 139.

(*t*) Companies Act, s. 69.

3. **Extraordinary resolutions.**--An extraordinary resolution is the first half of a special resolution; that is, it is a resolution passed by a three-quarters majority at a general meeting (*u*). It need not be confirmed. It may be used to wind up a company voluntarily on the ground that it cannot continue its business by reason of its liabilities, and that it is advisable to wind it up (*v*).

A copy of every special resolution and of every extraordinary resolution must be sent to the Registrar (*x*).

(*u*) Companies Act, s. 69.

(*v*) *Ibid.*, s. 182.

(*x*) *Ibid.*, s. 70.

## CHAPTER XVI. ACCOUNTS AND AUDITORS.

### SECTION 1.

#### Accounts.

DIRECTORS being agents and trustees for the company are bound to keep proper accounts, and they should be kept in a manner which prudent business people would adopt (*a*). A capital account must be included in the annual summary (*b*) (see p. 86). The Articles generally provide that copies of the accounts are to be sent to the shareholders, if so, preference shareholders and debenture holders must have the same rights in this respect as the ordinary shareholders (*c*).

The accounts are presented and passed at the annual general meeting.

The accounts must state the amount of capital (if any) which has been used to pay interest upon money spent on constructive works (*d*), and the amount which has been paid for underwriting, until written off (*e*).

On the next page will be found a form of accounts presented recently by the directors of an existing company to the shareholders.

The following points should be specially noted :

In order to show what profit has been made, the amount of capital subscribed must be shown. See item (*a*). If it can be shown that the assets amount to more than this sum, the balance is profit. Besides the subscribed capital, any moneys paid to reserve funds, etc., in previous years must be accounted for (see item (*b*)), and debts owed by the company must also be deducted from the assets. See item (*c*).

On the other side is set out the value of the assets. Notice

(*a*) *Hinds v. Buenos Ayres Co.*, [1906] W. N. 187.

(*b*) Companies Act, s. 26.

(*c*) *Ibid.*, s. 114.

(*d*) *Ibid.*, s. 91 (7).

(*e*) *Ibid.*, s. 90.

BLANK COMPANY,  
BALANCE SHEET,

LIABILITIES.							
	£	s.	d.	£	s.	d.	
To Share Capital authorised—							
150,000 Cumulative 5½ per cent. preference shares of £1 each... ..	150,000	0	0				
Less 8,000 cancelled in accordance with special resolution passed November 5th, 1909, confirmed November 22nd, 1909 ...	8,000	0	0				
				142,000	0	0	
50,000 Ordinary shares of £1 ... ..	50,000	0	0				
Less 8,000 cancelled in accordance with special resolution passed and confirmed as above ... ..	8,000	0	0				
				42,000	0	0	
				£184,000	0	0	
Issued and subscribed (a)—							
125,000 Cumulative 5½ per cent. preference shares of £1 each ... ..	125,000	0	0				
Less 8,000 cancelled as above ... ..	8,000	0	0				
				117,000	0	0	
50,000 Ordinary shares of £1 each ... ..	50,000	0	0				
Less 8,000 cancelled as above ... ..	8,000	0	0				
				42,000	0	0	
				159,000	0	0	
To 6 per cent. 1st Mortgage Debenture Stock ... ..				20,000	0	0	
„ Sundry Trade and other Creditors (c) ... ..				48,486	16	0	
„ Bills Payable ... ..				19,973	15	4	
„ Reserve Account (b) ... ..				8,500	0	0	
„ Bad Debt Reserve Account (b) ... ..				1,204	1	8	
„ Building (b) ... ..				700	0	0	
„ Insurance Reserve (b) ... ..				175	0	0	
„ Exchange Reserve at Shanghai ... ..				71	3	4	
„ Suspense Account for Dividend on Preference Shares (1st Oct. to 31st Dec., 1909) ... ..				1,608	15	0	
„ Profit and Loss Account balance, as per Account below (e) ... ..				3,397	12	8	
(NOTE.—Contingent Liability on Bills discounted £4,888 0 11)							
				£263,117	4	0	

LIMITED.

31st December, 1909.

ASSETS.									
	£	s.	d.	£	s.	d.			
By Goodwill, Trade Marks, and Patents, as per last Balance Sheet ... ..				58,987	16	5			
„ Freehold Property, as per last Balance Sheet	8,584	7	6						
„ Amount expended during year ... ..	13	13	2	8,598	0	8			
„ Leasehold Property, as per last Balance Sheet ... ..	1,648	8	2						
<i>Less</i> Written off for Depreciation (d) ...	226	3	11	1,422	4	3			
„ Fixed Plant and Machinery at Homerton, as per last Balance Sheet ... ..	2,324	6	4						
Amount expended during the year ...	389	8	3						
	2,713	14	7						
<i>Less</i> Written off for Depreciation (d) ...	581	1	7	2,132	13	0			
„ Tools and Stores at Homerton ... ..				247	4	6			
„ Fixtures, Fittings, Furniture, and Plant, at Queen Victoria Street, Upper Thames Street, and at shops as per last Balance Sheet ... ..	4,891	18	3						
Expended during the year ... ..	39	4	1						
	4,931	2	4						
<i>Less</i> Written off for Depreciation ...	360	4	8						
	4,570	17	8						
„ Fixtures at Montreal, New York, and Shanghai, <i>less</i> written off for Depreciation	888	15	8						
„ Fixtures and Plant at Glasgow, <i>less</i> written off for Depreciation ... ..	104	5	1						
„ Fixtures at Homerton <i>less</i> written off for Depreciation ... ..	326	6	2	5,890	4	7			
„ Travellers and Warehouse Plant, <i>less</i> written off for Depreciation ... ..				577	14	10			
„ Silver Mounters' Plant, <i>less</i> written off for Depreciation ...				147	3	8			
„ Investments at middle quoted prices, December 31st, 1909				580	11	3			
„ Bills Receivable ... ..				8,117	2	4			
„ Sundry Debtors ... ..	80,969	2	2						
<i>Less</i> Reserve for Discounts ... ..	1,344	18	0	79,624	4	2			
„ Amount due by H.M. Customs ... ..				8	2	4			
„ Advance on Leases ... ..				900	0	0			
„ Suspense Account of amount paid in anticipation at shops, Shanghai and New York ... ..				60	19	9			
„ Stock as per Inventories at London and Glasgow (certified by Managing Directors) and at Shanghai, Montreal, and New York ... ..				93,196	17	2			
„ Goods in Transit for Shanghai ... ..				105	4	4			
„ Cash. At Bankers ... ..				2,125	13	11			
In hand ... ..				395	6	10			
				£263,117	4	0			

## PROFIT AND LOSS ACCOUNT,

						£	s.	d.	£	s.	d.
To Director's Fees and Managing Directors'						2,500	0	0			
Remuneration (g) ... ..						210	0	0			
,, Auditors' Fees ... ..						130	18	0			
,, Pensions ... ..									2,840	18	0
,, Interest ... ..									7	17	1
,, Balance carried down (h) ... ..									9,974	8	8
									<u>£12,823</u>	<u>3</u>	<u>9</u>

						£	s.	d.	£	s.	d.
To Dividend at $5\frac{1}{2}$ per cent. per annum on Preference Shares (i)						6,765	0	0			
,, Debenture Interest (i) ... ..						306	3	5			
,, Amount transferred to Reserve (i) ... ..						1,000	0	0			
,, Balance carried to Balance Sheet (j) ... ..						3,397	12	8			

£11,468 16 1

Auditors'

(k) We report to the Shareholders that we have obtained all the information above Balance Sheet and Profit and Loss Account with the Books and Vouchers and that in our opinion the Balance Sheet is properly drawn up so as to exhibit to the best of our information and the explanations given to us, and as shown

LONDON, 14th March, 1910.

Year ended 31st December, 1909.

By Profit on Trading after providing for Bad and Doubtful Debts and Depreciation of Leases, Plant, and Machinery (f)	£	s.	d.
	12,784	2	0

NOTE.—The sum of £16,000 written off an exceptional Bad Debt has been provided by the Voluntary Surrender of 8,000 Preference and 8,000 Ordinary shares by the Chairman and Managing Directors of the Company.

„ Transfer Fees	...	...	...	...	...	...	8	19	6
„ Profit on Sale of Investments, less loss on purchase	...						30	2	3
							£12,823	3	9

By Balance brought down	...	...	...	...	...	...	£	s.	d.
							9,974	8	8
„ „ from last year	...				£4,494	7	5		
„ „ Less Dividend for the year 1908 on the Ordinary Shares at the rate of 6 %	...	3,000	0	0			1,494	7	5

£11,468 16 1

} Directors.

*Report.*

and explanations we have required, that we have examined and compared the in London and the audited statement from Montreal, New York, and Shanghai, a true and correct view of the Company's affairs at 31st December last, according by the Books of the Company.

Auditors.

that deduction is made, in the case of the leaseholds and plant, for depreciation. See item (d). As the assets exceed the liabilities, the balance is written under the latter head. See item (e). So much for the capital account.

The same profit is arrived at in the **profit and loss** account (p. 202).

The total amount of the trading profit for the year is stated. See item (f). From this are deducted directors' fees, etc. (see item (g)), leaving a balance (item (h)). Out of this are paid dividends on preference shares, interest on debentures, and amounts put by as reserve for the year (items (i)), and the balance (j) is profit which may be divided among the shareholders by declaring a dividend of (say) 5 per cent. on the ordinary shares, leaving a small balance to be carried over to the next year.

## SECTION 2.

### Auditors.

The Articles usually provide for the appointment of auditors and the auditing of the accounts of the company. But apart from any such provision, the Companies Act provides as follows:

An auditor is to be appointed at the general meeting of the company; if not, the Board of Trade may appoint (*e*).

A director cannot be an auditor.

**The auditors** shall have access to the books and papers of the company, and may require all necessary information and explanations from the officers of the company.

The auditors must make a report stating whether they have obtained all the information and explanations they have required, and whether the balance sheet is properly drawn up (see item (k)). The balance sheet must be signed by two directors. The auditors' report

(*e*) S. 112.



must be attached to or referred to in the balance sheet and must be read before the company in general meeting. Members are entitled to inspect the report and take copies (*f*).

**Duties of Auditors.**—The auditor's duty is (1) to see that the books show the true financial position of the company; (2) to report all material points to the shareholders.

**Newton v. Birmingham Small Arms Co., Ltd.,**  
[1906] 2 Ch. 378.

The directors resolved to create a secret reserve fund, the existence and purposes of which were not to be disclosed by the auditors to the company:—**Held**, the resolution was bad, as the auditors would be bound to disclose the facts.

He must be honest and must exercise reasonable care; otherwise he may be sued for damages. **It is not his duty to give advice**, and he has nothing to do with the way in which the business is carried on (*g*); nor is he bound to be a detective, but is  
(*f*) S. 113.

(*g*) *Notes of Cases on the Duty of Auditors (a).*

*Re London General Bank* (No. 2), [1895] 2 Ch. 673. The greater part of the capital of the company was advanced on loan to the Liberator and other Balfour companies upon securities which were insufficient and difficult to realise. For several years the auditors pointed out to the **directors** the unsatisfactory nature of these securities; but the auditors' report to the members on the balance sheet only stated that "the value of the assets as shown on the balance sheet is dependent on realisation." On the faith of this balance sheet dividends were declared, which were really paid out of capital:—**Held**—(1) It was nothing to the auditor whether the business of the company was being conducted prudently or imprudently, profitably or unprofitably, . . . provided he discharged his own duty to the shareholders. (2) His duty was to ascertain the true financial position of the company and to report to the shareholders. The auditors had failed in this, and were liable.

(*a*) This note is intended for the use of accountants and others specially interested in this question.

justified in believing tried servants of the company and in assuming that they are honest, provided he takes reasonable care (*h*). On the other hand, **if there is anything calculated to excite suspicion he should probe it to the bottom** (*h*), and he must not confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but should ascertain by comparison with the books of the company that it was properly drawn up so as to show the correct financial position (*i*).

An auditor, if formally appointed by the articles or under section 112 of the Companies Act, is an "officer" of the company, and liable to be proceeded against for misfeasance under section 215.

But an auditor informally appointed is not such an officer.

**Re Western Counties Bakeries Co.**, [1897] 1 Ch. 617.

The articles provided for the appointment of auditors in general meeting. P. and R. were employed as auditors on two occasions,

(*h*) *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279. The value of the company's stock-in-trade was grossly overstated for several years in the balance sheets, and the directors were thus enabled to pay dividends out of capital. The auditors accepted the certificate of the manager (a business man of high repute) as to the value of the stock. The auditors did not examine the books; if they had done so, and had added to the value stated in the previous year the amount spent on stock and deducted the amount received from sales, they would have seen that the valuation required explanation:—**Held**, the auditors were not liable: it was no part of their duty to take stock.

(*i*) *Leeds Estate Co. v. Shepherd* (1887), 36 Ch. D. 787. The Articles provide that the Directors should receive remuneration only if the dividends exceeded 5 per cent. The manager prepared a delusive balance sheet, which enabled the directors to declare dividends of over 5 per cent. and pay themselves their remuneration. The auditors did not look at the Articles or at the books of the company, but accepted the statement of the manager, and certified the accounts "to be a true copy of those shown in the books of the company." The dividends were in fact paid out of capital:—**Held**, the auditor was liable.

but were never formally appointed:—**Held**, they could not be made liable as “officers” of the company.

**Remuneration.**—The remuneration of an auditor is fixed by the general meeting which appoints him, and is paid by the company (*k*).

Auditors are agents for the shareholders: but the shareholders are not necessarily bound by notice of everything of which notice is given to the auditors (*l*).

(*k*) Companies Act, s. 112 (7).

(*l*) *Spackman v. Evans*, L. R. 3 H. L. 196, 235.

## CHAPTER XVII.

### PRIVATE COMPANIES.

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“**A private company**” is defined by the Companies Act to mean “a company which by its articles

- (a) restricts the right to transfer its shares ;
- (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty ; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company (a).

Several joint holders of a share are for the purposes of this definition treated as one member (b).

The Act does not specify in what manner the right to transfer shares must be restricted. It is probably sufficient if the right is so restricted that the directors can prevent the number of members from being increased beyond fifty.

Usually all the shares of a private company are held by a few persons, frequently members of the same family.

Legally, the position of a private company is in most respects the same as that of a public company, and even if one member holds practically all the shares, the company is a distinct “being” or “person” (see *Salomon v. Salomon & Co., Limited*, ante p. 6).

Thus the company is not bound by notice of matters which are in the knowledge of the one important member (see *The "Birnam Wood,"* [1907] P. 1).

It is sometimes difficult to say whether a company has issued an invitation to the public or not; but the test seems to be that the invitation must have been issued—

(1) by the company itself (*c*); and

(2) to any person who chose to apply for the shares.

**Sherwell v. Combined Incandescent Syndicate, Limited,**  
[1907] W. N. 110.

The directors printed a thousand copies of a prospectus headed "Strictly private and confidential: not for publication," and some were distributed by the directors among their friends:—**Held**, this was not an invitation to the public.

**A private company is exempt from the following provisions of the Companies Act:—**

Sect. 26 (3) That the annual summary must include a balance sheet.

Sect. 65. That a report must be sent to the members before the statutory meeting (see p. 191)

Sect. 72. That directors must not act unless they have filed a consent to act and have signed the Memorandum or a contract for their qualification shares (see p. 178).

Sect 82. Which requires **the issue of a statement in lieu of a prospectus** where no prospectus is issued.

(*c*) Thus in *Booth v. New Afrikander Co.*, [1903] 1 Ch. at p. 315, it was held that an offer by the liquidator of an old company, of shares in a new company, was not an offer to the public within s. 8 of the Act of 1900. And see *Burrows v. Matabele Gold Co.*, [1901] 2 Ch. 23.

Sect. 85. No allotment of shares to be made until minimum subscriptions subscribed (see p. 65).

Sect. 87. That a company must not commence business until the minimum subscription is subscribed and the directors have paid the proper proportion on their shares (see p. 65).

Sect. 114. Which gives the holders of preference shares the right to inspect balance sheets.

The **Articles of Association** of a private company usually contain special provisions (*d*) and for the purpose of obtaining the privileges of a private company should provide as follows:—

(1) **The transfer of shares should be restricted**, *e.g.* so that only members, or the sons or daughters, etc., of members, can become shareholders (*e*).

(2) The number of members (exclusive of employees) should be limited to 50.

(3) Invitations to the public to subscribe for shares or debentures should be prohibited.

(4) If it is intended to give some of the shares to employees, a provision should be inserted that they must transfer their shares if they are dismissed.

The vendor or chief member is often made governing director for life, and other directors are exempted from the rule which makes directors retire by rotation, etc.

**A private company may consist of two members only (*f*).**

(*d*) See Palmer's Company Precedents, 10th edit., vol. i. p. 876 *et seq.*

(*e*) *Attorney-General v. Jameson*, [1904] 2 I. R. 644.

(*f*) Companies Act, s. 2.

It may form itself into a public company by complying with the provisions of section 121 of the Companies Act.

A “**Syndicate**” is the name usually given to a company composed of a few members formed for the purpose of exploring or investigating the value of some property and of selling it, if satisfactory, to a larger company.

Syndicates are usually limited companies, and may be either public or private.

## CHAPTER XVIII.

## GUARANTEE COMPANIES.

A COMPANY limited by guarantee need not necessarily have any capital at all. Each member undertakes to contribute a certain sum if the company is wound up.

The Memorandum of Association therefore contains a declaration of this guarantee, but does not contain any statement as to the amount of capital, or that the liability of members is limited. In other respects, the Memorandum and Articles are similar to those of a company limited by shares.

If the company has a capital divided into shares, the amount of the capital and the number of shares must be stated in the Memorandum (*a*).

This provision was first made by the Companies Act, 1900, consequently in case of a company registered after the Act of 1900, the capital cannot be altered without a change of the Memorandum, which requires the leave of the court, but if registered before the Act, it may be able to change its capital by merely changing the Articles.

If there is no capital, persons dealing with the company have very little security, as there is no liability on the members until the company is wound up, and by that time most of the members may have retired.

If there is no capital divided into shares, no person who is not a member can participate in the profits of the company if it was registered after the 1st January, 1901 (*b*).

(*a*) Companies Act, s. 4 (2).

(*b*) *Ibid.*, s. 21 (1).



## CHAPTER XIX.

### WINDING UP BY THE COURT.

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IF the members wish the company to come to an end, or if it becomes insolvent, or if for any other reason it becomes desirable that the company should cease to exist, it is wound up.

A company may be wound up in three ways :

- (1) Compulsory winding up by the court ;
- (2) Voluntary winding up ;
- (3) Winding up under the supervision of the court.

Whichever way is selected, a liquidator or liquidators are appointed to administer the property of the company, and they must apply the assets of the company, first, in the payment of creditors in their proper order, and then in distributing the residue among the shareholders according to their rights.

A company cannot be made bankrupt.

#### SECTION 1.

When a company may be wound up by the court.

A company may be wound up by the court when (a)—

- (1) the company has passed a special resolution (b) to wind up; or,

(a) Companies Act, s. 129.

(b) See p. 196.

- (2) default is made in filing the statutory report or holding the statutory meeting (c); or
- (3) the company does not commence business within a year from its incorporation or suspends business for a year; or,
- (4) the number of the members falls below seven (or in case of a private company below two); or
- (5) the company is unable to pay its debts; or
- (6) the court is of opinion that it is just and equitable that it should be wound up.

As to (1).—A company may be wound up for any cause whatever if a sufficient number of members pass a special resolution that it shall be wound up.

As to (3).—The power of the court to wind up a company which has not carried on business for a year is discretionary, and will not be exercised unless there are indications that the company has no intention of continuing its business.

**Re Capital Fire Insurance** (1882), 21 Ch. D. 209.

A fire insurance company had commenced a considerable business in France within the year, and intended to commence in England so soon as sufficient capital should be subscribed. An order to wind up was refused.

A company will not be wound up because it has ceased to carry on one of several businesses, unless that business is the main object of the company.

**Re Amalgamated Syndicate**, [1897] 2 Ch. 600.

For facts, see p. 23.

A company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company.

(c) See p. 191.

As to (4).—A company is not often wound up by the court on the ground that the members are less than seven, because the court will not usually make an order to wind up where there are very few members, but will leave the company to wind up voluntarily.

As to (5).—A company is deemed to be unable to pay its debts,—

- (1) if a creditor to whom the company owes £50 or more has served on the company a demand for payment, and the debt has not been paid within three weeks ;
- (2) if an execution or a judgment remains unsatisfied ; or
- (3) if it is proved to the satisfaction of the court that the company cannot pay its debts (*d*).

The court must take into account contingent liabilities and assets of the company (*e*) ; but otherwise may be satisfied by any evidence that it deems to be sufficient.

**Re Globe Steel Co. (1875), L. R. 20 Eq. 337.**

The company accepted a bill of exchange in part payment for goods bought. No demand had been made or execution levied under section 80 (1) or (2). The bill was dishonoured :—**Held**, this was sufficient proof of insolvency.

A company may be wound up even when its assets are valuable, if they are locked up in investments and the company is being carried on at a loss.

(*d*) Companies Act, s. 130.

(*e*) *Ibid.*, s. 130 (4).

**Re Factage Parisien**, explained (1867) L. R. 2 Ch. App.,  
at pp. 746, 747.

The company was carrying on its business at a loss, and was paying its debts by making new calls on the members :—**Held**, the company may be wound up. “If they are carrying on business at a manifest loss, and it is totally impossible to make any profit, it can scarcely be said that this court will consider it just and equitable that the company should be allowed to continue when people who have embarked property to a considerable amount in it do not wish it to go on. . . . It is quite distinct from saying that it is an insolvent company, or that it cannot pay its debts. because the persons managing it will take care to have all the debts paid by making calls to meet them.”

**As to (6).**—It was at one time held that the court could not wind up a company on the ground that it was “just and equitable,” unless there was some cause similar to those mentioned in sub-ss. (1) to (4), but this doctrine is now practically disregarded (*Sailing-ship “Kentmere,”* W. N. (1897) 58). The court will not, however, make the order unless there is some special reason for doing so. Thus, general charges of fraud are not usually sufficient (*f*).

**Re Medical Battery Co.**, [1894] 1 Ch. 444.

Serious charges were made against the manager Harness of defrauding the public. The company went into voluntary liquidation, but some creditors wanted to have it wound up by the court :—**Held**, fraud towards the outside world is no ground for compulsory winding up.

But where the whole object of the company was fraudulent, the company has been wound up.

(*f*) Fraud, if alleged, must be specifically proved and it is not sufficient that it should appear in the statutory affidavit alone (*London & Hull Soap Works, Limited*, [1907] W. N. 254).

**Re T. E. Brinsmead & Sons**, [1897] 1 Ch. 45, 406.

T. E. Brinsmead and two of his sons had been in the employ of the old firm of John Brinsmead & Sons. They started a company, and agreed to sell to this company the business and name of T. E. Brinsmead & Sons. They were restrained by an injunction from using the name Brinsmead on the ground of fraud. A petition for compulsory winding up was then presented:—**Held**, the company was initiated to carry out a fraud; and was hopelessly embarrassed by a lot of actions for fraud; therefore it was just and equitable that it should be wound up.

A company may be wound up under this section for the purpose of defeating a reconstruction scheme which is prejudicial to the shareholders (*g*).

## SECTION 2.

### Who may Petition.

Winding up by the court is commenced by a petition to the court. Either a contributory or a creditor may petition or both together, for the order is made for the benefit of all (*h*).

**1. Petition by contributory.**—A contributory cannot petition unless he has held his shares for at least six months during the eighteen months preceding the petition, except where—

- (1) he is an original allottee, or
- (2) the number of the members has become less than seven.

A fully paid shareholder can petition; so can a member whose calls are in arrear; so can a contributory on the B. list (*i*). Any provision in the Articles

(*g*) *Consolidated South Rand Mines, Limited*, [1909] 1 Ch. 491.

(*h*) Companies Act, s. 138.

(*i*) Buckley, p. 321.

which deprives members of their right to petition is void. See p. 111 above.

The court is not bound to make the order on a contributory's petition, and may always have regard to the wishes of the creditors and other contributories (*k*).

The court will not order a winding-up if the interest of the petitioning contributory is very small, and the majority of the members do not wish the order to be made; or if the number of shareholders is very small:

**Re Professional, etc., Building Society** (1871), L. R. 6 Ch. 856.

Four members of a building society wished for compulsory winding up; the rest did not. The order was refused.

or if presented in bad faith.

**Re Metropolitan Saloon Omnibus Co.** (1859), 28 L. J. Ch. 830.

Certain creditors had brought a winding-up petition against the company, which was dismissed with costs. They then persuaded a shareholder to present a petition for the purpose of annoying the company:—**Held**, the petition is *malâ fide* and bad.

But the court will generally make the order where there is anything which seems to require investigation.

**Re Varieties, Limited**, [1893] 2 Ch. 235.

The company was formed to build a music hall on land leased to the company by S. S. was to build the hall. S. and his nominees held 3700 shares. The county council refused to sanction the plans. The holders of 3900 shares voted for a voluntary winding-up and appointed the secretary as liquidator. 847 independent shareholders wanted a winding-up by the court to inquire into the actions of S.:—**Held**, the conduct of S. may require investigation; the company must be wound up by the court.

**A contributory must allege and prove that there are assets (*l*).**

(*k*) Companies Act, s. 145.

(*l*) *Kaslo-Slocan Mining Corporation, Limited*, [1910] W. N. 13.

**Re Rica Gold Washing Co. (1879), 11 Ch. D. 36.**

A clergyman who held seventy-five £1 shares petitioned for winding-up on the ground that the directors had been guilty of fraud. The company had no assets except what might be got from the fraudulent directors:—**Held**, the petitioner has not alleged or proved that there were sufficient assets to give him a tangible interest in the winding-up. The petition was dismissed.

If the company does not send out proper notices before the statutory meeting, a contributory may petition to wind up the company (*m*).

The fact that a voluntary winding up has commenced does not prevent a contributory or a creditor from obtaining a winding up order if he is prejudiced by the voluntary winding up (*n*) (see further p. 233, *post*).

**2. Petition by creditor.**

The court (except in special circumstances) is bound to make the order to wind up if the creditor can prove that he has an undisputed debt and any of the things have happened which are enumerated in s. 129 (see p. 213, above). And the burden of proving that there are assets does not lie on the creditor (*o*).

But the court may refuse to order a winding-up if the majority of creditors do not want it:

**Re Ilfracombe Building Society, [1901] 1 Ch. 103.**

All the creditors except C. agreed to accept 12s. 6d. in the pound. C. afterwards petitioned to wind up:—**Held**, the petition must be dismissed.

or if the order will do no good.

(*m*) Companies Act, ss. 129 and 137.

(*n*) Companies Act, s. 197, and see *National Electricity Co.*, [1902] 2 Ch. 34.

(*o*) *Re Krasnapolsky Co.*, [1892] 3 Ch. 171. But the petition should state that there are assets ([1902] W. N. 77).

Before the Act of 1907 the court could refuse to make the order if there was nothing to wind up or no assets for the ordinary creditors (see *Re Greenwood & Co.*, [1900] 2 Q. B. 306).

But now “an order to wind up a company shall not be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, **or that the company has no assets**” (*p*).

And even before the Act the court has made the order in special circumstances, though there was probably nothing for the unsecured creditors.

**Re Alfred Melsom & Co.**, [1906] 1 Ch. 841.

The debenture-holders were carrying on the business in the name of the company, but no receiver had been appointed. There was no proof that there would be anything for the other creditors:—**Held**, even if there is nothing for the ordinary creditors it may be “just and equitable” that the company should be wound up—for they are obtaining credit from persons whose rights may be swallowed up at any moment by the debenture-holders (*q*).

**The court is not bound to make the order at once**; but may direct the petition to stand over for a time.

**Re Brighton Hotel Co.** (1868), L. R. 6 Eq. 339.

The shareholders were getting up a subscription to pay off the immediate debts and were going to appoint new directors and cut down the expenses:—**Held**, the petition must stand over for four weeks to allow this to be done.

(*p*) Companies Act, s. 141.

(*q*) See as to the position of creditors in this case, *London Pressed Hinge Co.*, [1905] 1 Ch. 576, and for cases in which a similar order was made, *Re Chic, Limited*, [1905] 2 Ch. 345; and *Re Criggleston Coal Co.*, [1906] 2 Ch. 327.



A creditor whose debt is disputed on some substantial ground cannot generally get a winding-up order. The court may either order the petition to stand over until the validity of the debt can be determined or may dismiss the petition, and may even restrain the creditor by injunction from bringing a threatened petition.

**Niger Merchants' Co. v. Capper** (1877), 18 Ch. D. 557 n.

C. claimed £500 from the company for services. The company said they owed C. £260 only and had a set-off for this. C. then threatened to wind up the company if he was not paid. The company was solvent:—**Held**, injunction granted to restrain C. from bringing the petition.

But the court will sometimes decide the validity of the debt forthwith.

**Re Imperial Silver Quarries Co.** (1868), 16 W. R. 1220.

J. sold a silver mine to the company for shares and debentures. The principal secured by the debentures was repayable out of profits. J. sold six debentures to A. One and a half years' interest became due, but there had been no profits. A. petitioned to wind up the company. The company disputed A.'s claim on the ground that the interest was payable out of profits only:—**Held**, this was not a very substantial dispute, and depended only on the construction of the debentures; the court decided that A.'s claim was good and made the order to wind up.

**A debenture-holder may petition** if the principal sum is payable to the debenture-holders direct, but **not** if it is payable to the trustees of a debenture trust deed (*Re Uruguay Central Rail. Co.* (1879), 11 Ch. D. 372) (*r*) and the order has been refused where the debenture-holders had power to appoint a receiver, and had not done so (*s*).

(*r*) *Re Dunderland Co., Limited*, [1909] 1 Ch. 446 (Debenture Stock holder).

(*s*) *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181.

The assignee of a debt can petition, but not a creditor of a third party who has, by means of a garnishee order, attached a debt due from the company to the third party.

A creditor who has commenced a petition cannot sell his debt and the right to carry on the petition (*Re Paris Skating Rink* (1877), 5 Ch. D. 959).

A creditor whose claim is contingent or prospective can petition on giving security for costs (*t*).

**British Equitable Bond, etc., Limited**, [1910] 1 Ch. 574.

The holder of an insurance policy which had not matured presented a petition. **Held**, he can petition.

A creditor whose claim is unliquidated cannot petition; he must first get a judgment fixing the amount of the debt. The creditor's **debt need not amount to £50**; but the court will not usually make a winding-up order if the petitioning creditor's debt is small. The £50 mentioned in s. 130 (see p. 215) is usually regarded as suggesting the minimum amount.

**Re Leyton Cycle Co.**, [1901] W. N. 225.

The petitioning creditor's debt amounted to £35. The court made the order but without costs. Afterwards it was stated that the petition was supported by creditors for £128, and the order was then altered so as to give the petitioner his costs.

Where the company refused to pay the debt because it was thought to be too small to support a winding-up petition, the Court made a compulsory order (*re World Industrial Bank, Limited*, [1909] W. N. 148).

An action will lie for maliciously presenting a winding-up petition.

(*t*) Companies Act, s. 137 (1) (c).

**Quartz Hill Co. v. Eyre** (1883), 11 Q. B. D. 674.

**Held**, no special damage need be proved, "for the presentation of the petition is from its very nature calculated to injure the credit of the company."

The court may wind up a foreign company if the management is conducted in England, but not otherwise.

**Re Commercial Bank of India** (1868), L. R. 6 Eq. 517.

The company was formed, incorporated and had its principal place of business in India. It had a branch office in England:—**Held**, it may be wound up in England.

### SECTION 3.

**Procedure on winding up by court.**—Proceedings to enforce winding up are commenced by petition, which is in much the same form as the petition on p. 125, and is supported by an affidavit of the petitioner (*u*).

If the capital of the company is not more than £10,000 the petition may be presented in the county court; if more, in the High Court.

The court may either—

- (1) dismiss the petition with costs; or
- (2) order it to stand over (see p. 220); or
- (3) make an order for winding up under supervision of the court (see p. 234): or
- (4) make a compulsory order for winding up the company, or any other order that may be just.

(*u*) The affidavit of some other person will be accepted if there is reason for so doing (*Re African Farms, Limited*, [1906] 1 Ch. 640).

If the order is made to wind up compulsorily, the court appoints a liquidator and may settle the list of contributories, make calls, etc., but these powers are now usually exercised by the liquidator. If a contributory is dead, the court may order that his estate be administered by the court.

**The winding-up dates from the presentation of the petition** (*v*), except for the purpose of preferential payments (see p. 242), when it dates from the order (*x*).

Persons entitled to be heard on the hearing of the petition are (1) the company; (2) any creditor; (3) any contributory.

Questions arising in the winding up can, with certain exceptions, be heard by the registrar (*y*). An appeal from his decision lies to the judge (*Re Pretoria Pietersburg Railway Co.*, [1904] 2 Ch. 170).

The petition must be presented at the registrar's office and must be advertised in the *London Gazette* and one other London or local paper, or as the registrar shall direct (*z*).

A slight mistake in the form of the advertisement will not invalidate the proceedings (*a*).

**Costs.**—If the petition is successful, the petitioner's costs are a first charge on the assets of the company available for the ordinary creditors; *e.g.*, **not** on property over which debenture-holders have a claim.

So, also, if the company, while in liquidation, brings or defends an action and is ordered to pay costs, they

(*v*) Companies Act, s. 139.

(*x*) *Ibid.*, s. 209.

(*y*) Winding-up Rules, 1909, r. 5.

(*z*) Winding-up Rules, 1909, r. 27.

(*a*) *Re Saul Moss & Sons, Limited*, [1906] W. N. 142.

are paid first out of the assets of the company (*re Wenborn & Co.*, [1905] 1 Ch. 413).

A person who lodges a second petition when one is already presented, may have to pay the costs.

Two companies cannot be wound up by the same order.

Appeal lies to the court of appeal (*b*).

The court may stay the proceedings in the winding-up, if they ought to be stayed for any reason.

When the affairs of the company are completely wound up, the **court makes an order that the company be dissolved**. The liquidator communicates this order to the registrar, who makes an entry in the register that the company is dissolved (*c*). The company then ceases to exist. Leases held by the company come to an end (*d*), and freehold land held by the company reverts to the grantor (*e*). Any chattels of the company that may happen to remain become vested in the Crown as *bona vacantia*.

**Re Taylor's Agreement Trusts**, [1904] 2 Ch. 737.

The liquidator of a company agreed to sell letters patent to A., but the company was dissolved before the patent was assigned to A.:—**Held**, the patent was vested in the Crown.

The Crown is not bound by trusts and therefore does not become a trustee of such chattels for the purchaser; but it appears that a new trustee of the property may

(*b*) Security for costs must be given *Consolidated South Rand, Limited*, 1909, W. N. 66.

(*c*) Companies Act, s. 172.

(*d*) *Hastings Corporation v. Letton*, [1903] 1 K. B. 378.

(*e*) *Ibid.* at p. 384. *Co. Lit.*, 13 B.

be appointed (*f*) and a vesting order made under section 35 of the Trustee Act, 1893 (*g*).

When a company has been dissolved, the court may within two years make an order declaring the dissolution to have been void (*h*).

A winding-up petition can only be withdrawn subject to the power of the court to substitute another creditor or contributory as petitioner (*i*).

For the effect of a winding-up order see Chapter XXIII.

(*f*) *Re 9, Bomore Road*, [1906] W. N. 16.

(*g*) Farwell, J., made a vesting order without the appointment of a trustee in *Re General Accident Assurance, Limited*, [1904] 1 Ch. 147, and in *Re Richard Mills & Co.*, [1905] W. N. 36; but Buckley, J., held that it was impossible to make a vesting order without appointing a new trustee in *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737; and see *Re Ruddington Land Co.*, [1909] 1 Ch. 701.

(*h*) Companies Act, s. 223.

(*i*) Winding-up Rules, [1909] r. 36.

## CHAPTER XX.

### VOLUNTARY WINDING UP.

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THE object of a voluntary winding up is that the company and its creditors shall be left to settle their affairs without coming to the court, but to provide them with every facility for applying to the court if necessary.

#### SECTION 1.

#### How and when a Company may be Wound up voluntarily.

There are three possible ways of winding up voluntarily. Each way requires a different form of resolution.

A company may be wound up voluntarily when (*a*)—

- (1) the period fixed for the duration of the company has come to an end, **or** an event upon which the company is to be wound up has happened **and** the company has in general meeting passed an **ordinary resolution** to wind up; or
- (2) the company has (for any cause whatever) passed a **special resolution** (*b*) to wind up voluntarily; or

(*a*) Companies Act, s. 182.

(*b*) See p. 196.

- (3) the company has passed an **extraordinary resolution** that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up.

**As to (1).**—A company can only be wound up by ordinary resolution if it is bound to cease under the terms of its regulations.

**As to (2).**—The company may be wound up by special resolution for any reason, even if it is flourishing.

**As to (3).**—Where a company is to be wound up by extraordinary resolution the notices calling the meeting must state that it is proposed to wind up the company because its liabilities prevent it from carrying on its business.

**Re Silkstone Fall Colliery Co. (1875), 1 Ch. D. 38.**

Notices were sent out of a meeting “to pass a resolution for the voluntary winding-up of the company, if it should be determined to do so.” An extraordinary resolution was passed for winding up:—**Held**, the notices were bad, as they did not specify that it was to be wound up for this reason.

**A voluntary winding-up dates from the passing of the resolution** which authorises it (*c*). In case of a special resolution it dates from the second or confirmatory resolution.

**Effect of voluntary winding up (*d*).**

- (1) The company ceases to carry on its business except for the purpose of beneficial winding up.
- (2) Transfers of shares are void except with the sanction of the liquidator.

(*c*) Companies Act, s. 183.

(*d*) Companies Act, ss. 184 and 205.



**Taylor's Case**, [1897] 1 Ch. 298.

After winding up T. transferred his shares to P., and P. transferred them to R. with the consent of the liquidator :—**Held**, the transfers were good. R. must be put on the A. list and T. and P. on the B. list of contributories.

Transfer of shares between the first and second meeting (in case of a special resolution to wind up) are good (*e*).

Debentures may be transferred (*e*).

**(3) Alterations in the status of members are void.**

**Costello's Case** (1869), L. R. 8 Eq. 504.

Special resolution to wind up passed August 7th. C. transferred his shares to an infant Q. on August 14th. Resolution confirmed August 23rd. The infant reached full age in October. The infant then confirmed the transfer :—**Held**, the transfer was void. Q. was an infant at the date of the winding-up, and therefore cannot change his status so as to become capable of ratifying after the winding up.

**(4) The corporate state and powers of the company continue.**

## SECTION 2.

**Proceedings on Voluntary Winding up.**

(1) (*f*) The property of the company is applied first in satisfaction of the liabilities of the company *pari passu* ; and subject thereto is distributed among the members.

(2) A liquidator is appointed by the company in general meeting. If the company is wound up by

(*e*) Buckley, p. 453.

(*f*) Companies Act, s. 186.

special resolution the liquidator may be appointed either at the confirmatory meeting or at a subsequent meeting. A special resolution is not necessary, nor need special notice be given of the intention to appoint liquidators.

**Re Trench Tubeless Tyre Co.,** [1900] 1 Ch. 408.

Notices were sent out of a meeting to confirm a resolution to wind up and to appoint W. as liquidator. At the meeting M. was appointed:—**Held**, the appointment was good, as no notice was needed.

(3) On appointment of the liquidator the powers of the directors cease, unless continued by the sanction of the company in general meeting or of the liquidator.

(4) If there is more than one liquidator their powers may be exercised by any one of them if this is sanctioned by the company at the time of their appointment; if not, by any two. But they may not otherwise delegate their powers.

**Bolognesi's Case** (1870), L. R. 5 Ch. App. 567.

After winding up, a director, who was also one of the four liquidators, accepted a bill of exchange:—**Held**, the company was not bound to pay.

(5) The liquidator may, without leave of the court, exercise all the powers of a liquidator appointed by the court. This includes power to sell. But the liquidator sometimes asks the sanction of the court before selling.

(6) The liquidator settles the list of contributories, and his list is *primâ facie* evidence of their liability.

(7) The liquidator must call a meeting of creditors within seven days (*g*).

(*g*) Companies Act, s. 188.

(8) The liquidator **must pay the debts of the company** and settle the rights of the contributories *inter se*.

If he fails to do so, the creditor or contributory who is not paid can apply to the court under section 193 of the Companies Act; but he cannot claim payment from the liquidator personally either under this section (*h*) or by an action commenced by writ (*i*); but if the liquidator has destroyed the remedy of the creditor or contributory by allowing the company to be dissolved or (possibly) by parting with all its assets, the liquidator becomes personally liable.

**Pulsford v. Devenish**, [1903] W. N. 179.

The liquidator **negligently** omitted to pay one of the creditors of the company. The company was wound up and ceased to exist:—**Held**, the liquidator was still under his statutory liability to pay the debts, and must pay the plaintiff out of his own pocket.

If **there is no liquidator** the court may appoint one, and the court may dismiss a liquidator for due cause (*j*), and appoint another.

**Re Sunlight Incandescent Co.**, [1900] 2 Ch. 728.

**Held**, the court may appoint an additional liquidator without dismissing any of the existing ones, if there is due cause.

The company may delegate to its creditors the power to appoint liquidators.

**Arrangements** by a company with its creditors or members are binding—

- (1) on the company, if sanctioned by an extraordinary resolution;
- (2) on the creditors or members or any class of creditors or members if acceded to by three-quarters in number and value of the creditors or members or class affected (*k*).

but subject to appeal to the court (*l*).

(*h*) *Hall's Waterfall Co.*, [1896] 1 Ch. 947.

(*i*) *Knowles v. Scott*, [1891] 1 Ch. 717.

(*j*) Companies Act, s. 186 (ix.).

(*k*) *Ibid.*, s. 120.

(*l*) *Ibid.*, s. 191.

The court may for this purpose call a meeting of creditors or members, and may declare the arrangement binding, if it is confirmed by a three-quarters majority (*m*).

**Re Tea Corporation, Limited**, [1904] 1 Ch. 12 at p. 23.

On the winding-up, the assets were not sufficient to leave anything for the ordinary shareholders. An arrangement was made; the preference shareholders and creditors voted for it; but the ordinary shareholders voted against it:—**Held**, as the ordinary shareholders had no interest in the assets, their dissent did not matter.

The liquidator or any creditor or contributory may apply to the court (*n*) as in a winding-up by the court, and the jurisdiction of the court is generally much the same as on a winding-up by the court.

The liquidator may summon general meetings of members, and **must** do so at the end of every year of the winding-up, and make a report to the members (*o*).

**When the affairs of the company are fully wound up, the liquidator** prepares an account, **calls a general meeting**, and lays the account before the meeting. Notice of this meeting is given to the registrar, and **after three months the company is deemed to be dissolved** (*p*), and ceases to exist (*Re Westbourne Grove Drapery Co.*, W. N. (1878), 195).

If after the meeting it becomes desirable to keep the company alive for more than the three months, this may be done by an order deferring the date of dissolution (*p*) or the dissolution may be declared void (*q*).

The costs of a voluntary winding-up are payable first out of the assets (*r*).

(*m*) Companies Act, s. 120.    (*n*) *Ibid.*, s. 193.    (*o*) *Ibid.*, s. 194.  
 (*p*) *Ibid.*, s. 195.    (*q*) *Ibid.*, s. 223.    (*r*) *Ibid.*, s. 196.

A creditor has a right to a winding-up by the court in spite of a voluntary winding-up having commenced: but the court will not make the order unless it thinks that the creditor's rights are prejudiced by the voluntary winding-up (s), or unless the general body of creditors claim a winding-up by the court (*Re Bishop & Son*, [1900] 2 Ch. at p. 258).

The court will not as a rule upon the petition of a contributory make an order for compulsory winding-up after a voluntary winding-up has commenced, unless—

- (1) the voluntary winding-up is fraudulent; or
- (2) there are circumstances of suspicion; or
- (3) a searching investigation is needed.

But the court has a discretion and has power to make the order whenever the contributory would be prejudiced by a voluntary winding-up (t).

**Re National Company for Distribution of Electricity,**  
[1902] 2 Ch. 34.

After voluntary winding-up commenced, some fully paid shareholders presented a petition for compulsory winding-up, though there were ample assets, on the ground that some of the directors had received presents:—**Held**, a compulsory order may be made on the petition of fully paid shareholders, where there are surplus assets, and even though there is no fraud. But not in this case, as it would not bring anything to the shareholders.

If the court makes an order for compulsory winding-up after a voluntary winding-up has commenced, this does not make the proceedings under the voluntary winding-up void, and the court may adopt all the previous proceedings (u).

In such a case the winding-up dates from the presentation of the petition (x).

(s) Companies Act, s. 197. (t) *Ibid.*, s. 197. (u) *Ibid.*, s. 198.

(x) *Russell Hunting Record Co.*, [1910] 2 Ch. 78.

## CHAPTER XXI.

WINDING UP UNDER SUPERVISION OF  
THE COURT.

WHEN a special or extraordinary resolution has been passed to wind up voluntarily, the court may order that the winding-up shall proceed under the supervision of the court, or a creditor may petition that the company be wound up under the supervision of the court (*a*).

The effect is that the liquidator may exercise all his powers without the sanction of the court as in a voluntary winding-up, but subject to such restrictions as the court may direct.

**The court has a discretion**, both as to whether the order shall be made, and as to the amount of restriction that shall be imposed on the liquidator.

**Re Watson & Sons**, [1891] 2 Ch. 55.

**Held**, the court has power by restrictions imposed on the voluntary liquidator, almost to turn a voluntary liquidation into liquidation by the court, or it may relax the restrictions according to the requirements of each case.

The effect of the order is the same as an order for compulsory winding-up, except that the following sections do not apply (*b*).

Section 147, which requires a statement of the company's affairs to be submitted to the Official Receiver.

(*a*) Companies Act, s. 199. This section does not apply to a winding-up commenced by ordinary resolution.

(*b*) Companies Act, s. 203.

Section 148, which requires the Official Receiver to make a report to the court.

Section 149 (sub-sects. 1 to 9), relating to the appointment of liquidators by the court. (Sub-sect. 10, making the acts of a liquidator valid in spite of any defect in his appointment, applies to a winding-up under supervision.)

Section 152, requiring the Official Receiver to summon meetings of creditors and contributories.

Section 153, requiring the liquidator to give information to the Official Receiver.

Section 154, requiring payment of the moneys in the hands of the liquidator into the Bank of England.

Sections 155 and 156, requiring the liquidator to send accounts to the Board of Trade and to keep proper books.

Section 157, as to the release of the liquidators.

Sections 158 and 159, as to the control of the liquidator by the meetings of creditors and the Board of Trade.

Sections 160 and 161, as to committee of inspection and special managers.

Section 162, as to the appointment of the Official Receiver to be receiver for debenture-holders.

Section 173, as to making rules for the conduct by the liquidator of the powers of the Court.

Section 175, providing for the public examination of promoters, directors, or other officers of the company.

Since the Companies Act, 1900, gave creditors power to apply to the court in a voluntary winding-up, the chief reason for ordering a winding-up under supervision has gone. But the order is still sometimes made.

If a petition is presented for winding-up under supervision, the court cannot make a compulsory order on the motion of a creditor (*c*); and if an order is made for winding-up under supervision, a creditor cannot present a petition for compulsory winding-up, but the official receiver may do so (*d*).

(c) *Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563.

(d) *Jubilee Sites Syndicate*, [1899] 2 Ch. 204.

## CHAPTER XXII.

### LIQUIDATORS.

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#### SECTION 1.

##### Appointment.

**On a winding-up by the court.**—As soon as the winding-up order is made the **official receiver becomes provisional liquidator** (*a*). He summons meetings of creditors and contributories to determine—

- (1) whether another liquidator shall be appointed;  
and
- (2) whether a **committee of inspection** shall be appointed.

Such a committee if appointed must consist of contributories or creditors and must meet once a month. The official receiver may apply to the court for the appointment of a special manager. Shortly after the winding-up has commenced **the court appoints a liquidator** (*b*). (Before 1890 he was called the official liquidator.) He must notify his appointment to the registrar and give security not to make away with the assets (*c*).

The liquidator should be an independent person; but the secretary of the company may be appointed,

(*a*) Companies Act, s. 149, 3 (*b*).

(*b*) *Ibid.*, s. 149.

(*c*) *Ibid.*, s. 149, 3 (*c*).



unless his conduct, or that of the directors, ought to be inquired into. The wishes of the creditors are regarded in the choice of the liquidator.

**Re Association of Land Financiers** (1878), 10 Ch. D. 269.

The company was wound up and W. was appointed liquidator. 250 unsecured creditors applied by motion that two creditors might be appointed instead of W. The order was made as asked.

The liquidator is paid a salary; he may resign or may be removed by the court.

A contributory or a creditor can apply for his removal; but not an outside person (*d*).

The liquidator takes into his custody all the property of the company. **The property does not vest in the liquidator.** He is a trustee for all persons who were creditors of the company at the date of the winding-up. (It is for this reason that the statute of limitations does not run after the winding-up has commenced.) The liquidator represents both the company and the creditors; he is in the position of a receiver and manager of partnership assets, and he must give the creditors and contributories every assistance in inspecting the books of the company, etc.

**Powers of the liquidator** (*e*).

(1) To bring and defend actions in the name of the company.

If he brings an action in the name of the company he does not become liable for costs; but if he brings it in his own name he is personally liable, but has a right to be indemnified out of the assets of the company.

(*d*) *Re New de Kaap, Limited*, [1908] 1 Ch. 589.

(*e*) Companies Act, s. 151.

(2) To carry on the business of the company so far as may be necessary for the beneficial winding-up.

**Re Wreck Recovery Co.** (1880), 15 Ch. D. 353.

The company was being wound up. L., one of the shareholders who believed in the value of the company's patents, made a contract with the liquidator whereby he was to have the use of the plant of the company to raise three sunken vessels at his own expense, the profits (if any) to go to the company:—**Held**, the contract was bad; as it was not for the purpose of beneficial winding-up, but to resuscitate the company.

(3) To sell the property of the company.

(4) To execute and seal documents and deeds on behalf of the company.

(5) To prove in the bankruptcy of any contributory.

(6) To draw bills of exchange, etc.

(7) To raise money on the security of the assets.

(8) To take out letters of administration to any deceased contributory.

(9) To do all things necessary for the winding-up of the company and distributing the assets.

Also, by the Winding-up Rules, 1909, the liquidator may exercise the following powers, which by the Companies Acts are assigned to the court:

(1) **Summon meetings** of the contributories.

(2) **Fix a date by which creditors must prove their claims** or be debarred from all remedy against the company;

(3) **Settle the lists of contributories** (*f*).

There are two lists, the "A. list" or list of persons liable to contribute as present members, and the "B.

(*f*) See Companies Act, s. 163.

list " of persons who have ceased to be members within a year of the winding-up. See p. 82, above. Each list distinguishes between those who are liable personally and those who are liable as personal representatives, etc.

The liquidator is entitled and is bound to get all contracts for the allotment of shares otherwise than for cash filed with the registrar (*Re X. & Co.*, [1907] 2 Ch. 92).

(4) **To make calls** on the contributories for the purpose of paying the debts of the company and for adjusting the rights of the contributories *inter se* (g).

An immediate call may be made, though by the terms of allotment the calls are only payable by instalments; for the statutory right of the liquidator to make calls takes the place of the company's right to make calls under its agreement (*Fowler v. Broad's Night Light Co.*, [1893] 1 Ch. 724).

Any order made by the court as to calls is conclusive; but is only *prima facie* evidence against the real estate of a deceased contributory unless the heir or devisee was on the list of contributories (h).

**On a winding-up under supervision** the same rules apply as to the liquidators, but with the exceptions and modifications mentioned on pp. 234 and 235.

**On a voluntary winding-up** the liquidator is appointed **by the company** in general meeting, and has the same powers as a liquidator in a winding-up by the court. See p. 237.

If his appointment is defective he cannot sue for remuneration, but if the company or the new liquidator take advantage of his services he can claim reasonable payment (*Re Allison*, [1904] 2 K. B. 327).

(g) See *Wakefield Rolling Stock Co.* on p. 245.

(h) Companies Act, s. 168.

## CHAPTER XXIII

## CONSEQUENCES OF WINDING-UP.

(1) As to proceedings against the company.—After the winding-up petition is presented the court may stay any proceedings against the company (*a*).

After the winding-up order all proceedings against the company **must** cease, unless the court gives special leave for them to continue. This includes distress for rent by a landlord.

But the court will not, as a rule, interfere if the distress was levied before winding-up, though not completed till afterwards. If rent accrues after the winding-up for the convenience of the winding-up, the landlord will be allowed to distrain in full (*b*); for all costs incurred in the winding-up are payable in full before the assets are distributed.

The same rules apply to a winding-up under supervision.

On a **voluntary winding-up** the court **may** restrain proceedings against the company.

**Westbury v. Twigg**, [1892] 1 Q. B. 77

The plaintiff got judgment for a debt against the company on the same day as the voluntary winding-up commenced. Next day the sheriff took possession in execution of the judgment :—**Held**, if on a compulsory winding-up the execution would be stayed *ipso facto*, then the court has power to do so at any time before the sale.

(*a*) Companies Act, s. 140.

(*b*) Rawlins and Macnaghten, p. 317.

The object of the court is to ensure that all creditors are paid *pari passu* as far as it is just.

(2) **As to dispositions by the company.**—Dispositions by the company of its property after the commencement of the winding-up are void unless the court otherwise orders.

**Gibbs and West's Case** (1870), L. R. 10 Eq. 312.

After the winding-up petition the company wanted money at once, and borrowed £5000 from its bank, and gave the bank a charge for £5000 on the proceeds of a call made before winding-up, which would be paid in a few days:—**Held**, the money was borrowed to prevent the cessation of the company. Therefore the court ought to allow the charge.

Any disposition by the company which would be a fraudulent preference in the case of a private trader, is the same on the winding-up of a company (*Re Stenotyper, Limited*, [1901] 1 Ch. 250).

The liquidator can make contracts but only so far as necessary for the beneficial winding-up of the company. See p. 238.

(3) **As to the creditors of the company.**

**In the winding-up of any company** whose assets are insufficient for the payment of its debts **the same rules prevail** as to (1) the respective rights of secured and unsecured creditors (2) as to debts provable, and (3) as to the valuation of annuities and future and contingent liabilities **as are in force under the law of bankruptcy (c).**

This applies to a voluntary winding-up if the company is insolvent (*d*).

(c) Companies Act, s. 207 (1).

(d) *Re Thos. Salt & Co.*, [1908] W. N. 63.

### Result of this Rule.

A **secured creditor** may either (1) value his security and prove in the winding-up for the balance of his debt, or (2) give up his security and prove for the whole amount (*e*).

Where the security is only a floating charge secured by debentures, certain unsecured debts are paid before the debenture-holders (*f*).

These **preferential payments** are—

- (i.) Rates and taxes for not more than one year.
- (ii.) Wages of a clerk or servant for not more than four months and not exceeding £50.

This may include the secretary (*g*).

- (iii.) Wages of a workman for not more than two months and not exceeding £25.
- (iv.) Compensation due to an employee under the Workmen's Compensation Act, 1906, but not exceeding £100.

These preferential payments have priority also over a landlord's right of distraint (*h*).

**Unsecured creditors** are paid in the following order:—

- (1) Preferential payments as above.
- (2) Other debts *pari passu*—except that
- (3) debts in respect of which a rate of interest is paid varying with the profits of a business are postponed until other debts are paid in full.

(*e*) *Re Ligonel Spinning Co.*, [1900] 1 I. R. 326.

(*f*) Companies Act, s. 209.

(*g*) *Cairney v. Back*, [1906] 2 K. B. 746.

(*h*) Companies Act, s. 209 (4).

**Debts which may be proved** include "All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding in damages" (*i*).

**Re Patent Floor Cloth Co.** (1872), 26 L. T. 467.

D. and G. were employed by the company as travellers on commission for three years. During the first year they made £400. The company was wound up. D. and G. claimed £800 damages:—**Held**, they can claim for a fair proportion of their prospective loss.

Persons who claim to be creditors must prove their debts within the time fixed by the liquidator (*j*).

If a creditor does not prove within the time fixed, he may still prove, and may then be paid out of any assets remaining in the hands of the liquidator; but he cannot upset any dividend which has been paid (*k*).

If he has not claimed enough in his proof, he may get leave to amend it (*l*).

The costs of proving a debt are added to the amount of the debt. But if the creditor commences an action for the debt before the winding-up, and the liquidator continues to defend the action, and fails, the costs are paid first out of the assets (*m*).

The court has a discretion and has refused to allow costs to be paid in this way, where the liquidator offered to allow the creditor to prove in the winding-up for an amount to be ascertained in the winding-up proceedings (*n*).

A creditor cannot prove for interest on his debt after the commencement of the winding-up (*o*).

**Set Off.**—The same rules apply as in bankruptcy.

(*i*) Companies Act, s. 206.

(*j*) *Ibid.*, ss. 169 and 173, and rule 102 of 1909.

(*k*) *General Rolling Stock Co.* (1871), L. R. 7 Ch. 646.

(*l*) *Re Henry Lister*, [1892] 2 Ch. 417.

(*m*) *Wenborn & Co.*, [1905] 1 Ch. 413.

(*n*) *Cf. Rose & Co. v. Garden Lodge Co.* (1878), 3 Q. B. D. 235.

(*o*) *Re Thos. Salt*, [1908] W. N. 63.

Therefore where there have been mutual dealings between a creditor and the company, the debt due from one can be set off against the debt due from the other, and the creditor can only prove, or be made liable for, the balance (*p*).

As to set off in case of calls, see p. 245.

The bankruptcy rules as to **fraudulent preferences** also apply (*q*).

**Re Jackson & Bassford, Limited**, [1906] 2 Ch. 467.

The principal director of a private company guaranteed the overdraft of the company at its bankers, and the company agreed to give him debentures "whenever called upon by him to do so." The director called for his debentures less than four weeks before the company was wound up.—**Held**, the debentures were a fraudulent preference.

And if a floating charge is created within three months of a winding-up, the charge is void except as to any money paid at the time the charge was given unless the company can be proved to have been solvent (*r*).

**Columbian Fireproofing Co.**, [1910] W. N. 95.

Money advanced a few days before the charge was given and in reliance on a promise to execute the charge was held to be money paid "at the time."

The reputed ownership clause (*s*) (by which the property of other persons left in the possession of the bankrupt may pass to the trustee in bankruptcy) does not apply to the winding-up of a company.

(*p*) Bankruptcy Act of 1883, s. 38.

(*q*) Companies Act, s. 210.

(*r*) *Ibid.*, s. 212.

(*s*) S. 44 (iii.) of the Bankruptcy Act, 1883.



**Gorringe v. Irwell Works** (1886), 34 Ch. D. 129.

C. & Co. owed money to the I. Company. The I. Company owed money to H. & Co. The I. Company wishing to pay H. & Co., wrote to them, "We hold at your disposal £425 due to us from C. & Co." No notice of this assignment was given to the debtor (C. & Co.) The I. Company was wound up:—**Held**, the assignment is good (as between the I. Company or their liquidator, and H. & Co.) The reputed ownership clause does not apply to the winding up of companies.

(4) **As to contributories.**—The liabilities of the contributories and their rights over the assets of the company are adjusted by the court.

**Re Wakefield Rolling Stock Co.**, [1892] 3 Ch. 165.

The capital was divided into 30,000 fully paid £1 shares and 24,000 shares of £5 each on which £1 was paid. Some of the £5 shares had been fully paid up in advance of calls. On the winding-up, after paying the debts, there was not enough to pay all the contributions in full:—**Held**, the assets must be applied (1) in paying back the amount advanced on the £5 shares with interest; (2) in paying 16s. per share on the fully paid £1 shares; and (3) the rest to be divided *pro rata* between the holders of all shares.

And the court may make calls on the partly paid shares in order to distribute the assets fairly among all the shareholders (*Welton v. Saffery*, p. 118).

A person who is wrongfully put on the list of contributories may apply to the court to rectify the list; and he does not lose his right by delay, at any rate if the company has not been injured by the delay (*Shewell's Case* (1867), L. R. 2 Ch. 387).

A contributory who is a creditor of the company **cannot set off his debt against his liability for calls**; whether the call was made by the company before liquidation or by the liquidator afterwards.

**In re G. E. B. (a debtor)**, [1903] 2 K. B. 340.

The liquidator obtained judgment against B. for calls. The company owed money to B. The liquidator served a bankruptcy notice on B. B. claimed that the notice was bad as he had a right of set off, and, therefore, did not owe anything to the company:—**Held**, the notice was good; for he had no right of set off.

The court may order any contributory to pay to the company any sum due from him (*t*). But a fully paid shareholder may not be put on the list of contributories merely to give the court this summary power against him.

**Re Marlborough Club Co.** (1868), L. R. 5 Eq. 365.

The liquidator proposed to supplement the list of contributories by a list of fully paid shareholders who owed money for subscriptions, drinks, etc. to the club:—**Held**, these shareholders cannot be put on the list solely to give the court jurisdiction to enforce payment of debts due from them.

(5) **As to the servants of the company.**—A winding-up by order of the court operates as a discharge of the servants of the company.

**Measures Brothers, Limited v. Measures**, [1910] 1 Ch. 336.

M. agreed to act as director for the company for seven years and that he would not engage in any competing business for seven years after he should cease to hold office. The company was ordered to be wound up. **Held**, the winding-up order operated as a wrongful dismissal of M., and he was free from his agreement not to compete with the company.

A voluntary winding-up does not operate as a discharge (*Midland Counties Bank v. Attwood*, [1905] 1 Ch. 357).

(6) **As to the officers of the company.**—When a

(*t*) Companies Act, s. 165.

winding-up order has been made, the **court may summon any officer of the company**, or any person indebted to the company, or who has property of the company in his possession, or who can give any information as to the company and order him to bring with him any books and documents relating to the company (*u*). And the court may order that any person who has taken part in the promotion of the company or has been a director or officer of the company, shall attend and be **publicly examined** as to the formation and business of the company and as to his conduct (*x*).

There need only be a *prima facie* case of suspicion.

**Re Bank of Hindustan** (1871), L. R. 13 Eq. 178.

F. held forty-five shares in the company and could not be found. Mrs. E., his mother-in-law, refused to give his address:—**Held**, an order may be made for her examination.

Such an order will not be made merely for the purpose of enabling a dissentient shareholder in a reconstruction (see p. 248) to ascertain the value of his share of the assets (*re British Building Stone Co.*, [1908] 2 Ch. 450).

The person examined must answer questions which relate to mere hearsay, but not questions which may tend to incriminate him (*y*).

“**Officer of the company**” includes the directors, managers, etc., and may include the secretary, solicitor (*z*), or auditors (*a*) of the company.

(*u*) Companies Act, s. 174.

(*x*) *Ibid.*, s. 175.

(*y*) The person examined may be entitled to his costs if he is a party or likely to be a party, but not otherwise (*Re Appleton*, [1905] 1 Ch. 749).

(*z*) *Re Liberator Society* (1893), 71 L. T. 406.

(*a*) See p. 206.

## CHAPTER XXIV.

### RECONSTRUCTION.

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RECONSTRUCTION generally means that a company needs more capital and cannot get it without putting some pressure on the existing shareholders. To do this a new company is formed, and the old company sells its undertaking to the new company in return for shares in the new company, in such a way that each shareholder in the old company is entitled to one or more shares in the new. But whereas the shares in the old company were fully paid, those in the new company are only partly paid, so that each shareholder must either undertake a fresh liability for calls or give up his shares.

This can only be done under the provisions of section 192 of the Companies Act, which provides an ample safeguard for the rights of shareholders who dissent from the scheme, provided they notify their dissent in the proper way.

By section 192.—If a company is being or is proposed to be wound up altogether voluntarily, and its property is proposed to be transferred or sold to another company, the liquidators of the first company may, with the sanction of a special resolution, receive in compensation, shares, etc., in the other company to distribute among the members of the first company. This shall

be binding on the members of the first company. **But if any member** who has not voted for the special resolution, **expresses his dissent** in writing addressed to the liquidator and left at the registered office of the company within seven days after the confirmation of the resolution, **he may require the liquidator** either—

(1) To abstain from carrying the resolution into effect; or

(2) **to purchase his interest** at a price to be determined by agreement or in default by arbitration.

The money must be paid before the company is dissolved.

**If within a year an order is made for winding up** by the court or under supervision, **the resolution becomes void** unless sanctioned by the court (*a*).

Thus, the parties to such an arrangement can never be sure that it will ultimately be valid and binding, and the difficulty cannot be got over by applying to the court for its sanction, unless a winding-up order has been made. The only way to make the arrangement certain is to apply to the court for an order for winding up under supervision, and when the order is made, to apply that the arrangement may be sanctioned. This was done in *Re New Flagstaff Co.*, W. N. (1889) 123.

If a shareholder does not dissent in the manner provided by the Act within seven days, he loses his rights in the company.

The notice of dissent must comply in all material respects with the provisions of the Statute.

(*a*) A contributory may petition to wind up the company for the purpose of defeating such a scheme under this provision (*Consolidated South Rand Mines*, [1909] 1 Ch. 491.)

**Union Bank of Kingston upon Hull** (1880), 13 Ch. D. 808.

**Held**, that the notice of dissent must contain express notice to the liquidator to abstain from carrying the resolution into effect or to purchase the shares.

But an informality which is merely technical may be waived by the liquidator.

**Brailey v. Rhodesia Consolidated, Limited**, [1910] 2 Ch. 95.

The registered office of the company was in Rhodesia. B., a shareholder, sent his notice of dissent to the liquidator in London. The liquidator acknowledged the receipt of the notice and took no objection to its form for more than three weeks:—**Held**, the notice was sufficient.

If there are many dissentient shareholders who give notice of dissent within the proper time and in the proper manner, it becomes very difficult for a company to be re-constructed, for each dissentient shareholder thereby becomes entitled to the value of his share in the company and this is determined, not by the market value of the share but by the value of an aliquot part of the whole assets of the company. Hence companies have frequently tried to evade the Act.

A company cannot deprive its shareholders of their rights as dissentients under this section either directly or indirectly for—

(1) **Any provision in the Articles depriving members of their rights under this section is void.**

**Payne v. Cork Co.**, [1900] 1 Ch. 308.

The Articles gave the liquidator power on a winding-up of the company to sell the undertaking for shares in another company with the sanction of a special resolution, and provided that, notwithstanding section 192 (then section 161 of the Act of 1862), the shareholders should not have power to require him to buy their shares:—**Held**, the Article is bad.

(2) Schemes by which a company sells its undertaking under a power to do so contained in the

Memorandum with a view to reconstruction are void unless they make proper provision for the rights of dissentient shareholders (*b*).

**Bisgood v. Henderson's Transvaal Limited,**  
[1908] 1 Ch. 743.

The company by special resolution approved a scheme for the sale (under a power in its Memorandum) of all its undertaking to a new company for shares in the new company of £1 each credited as paid up to the extent of 17s 6*d.* per share only. The shares in the new company were to be distributed among the shareholders in the old company. If any shareholders did not approve, the shares to which they were entitled were to be sold and they were to be paid their proportion of the purchase price. **Held**, the scheme was *ultra vires* and void.

A company cannot sell its assets under this section to a foreign company (*c*).

(*b*) As to the rights of the shareholders to set aside the transaction after it has been completed, see *Clinch v. Financial Corporation*, L. R. 4 Ch. 118.

(*c*) *Thomas v. United Butter Companies of France, Limited*, [1909] 2 Ch. 484.





## APPENDIX.

### COMPANIES (CONSOLIDATION) ACT, 1908.

**Section 26.**—(1) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars :—

- (a) The amount of the share capital of the company, and the number of the shares into which it is divided ;
- (b) The number of shares taken from the commencement of the company up to the date of the return ;
- (c) The amount called up on each share ;
- (d) The total amount of calls received ;
- (e) The total amount of calls unpaid ;

- (f) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return ;
- (g) The total number of shares forfeited ;
- (h) The total amount of shares or stock for which share warrants are outstanding at the date of the return ;
- (i) The total amount of share warrants issued and surrendered respectively since the date of the last return ;
- (k) The number of shares or amount of stock comprised in each share warrant ;
- (l) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called ; and
- (m) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.

(3) The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss.

(4) The above list and summary must be contained in

a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.

(5) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

**Section 80.**—(1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar of companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

**Section 81.**—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who

is or has been engaged or interested in the formation of the company, must state—

- (a) the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and
- (b) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions, and addresses of the directors or proposed directors; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by

- the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor : Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors ; and
- (g) the amount (if any) paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill ; and
  - (h) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission : Provided that it shall not be necessary to state the commission payable to sub-underwriters ; and
  - (i) the amount or estimated amount of preliminary expenses ; and
  - (j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment ; and
  - (k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected : Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus ; and
  - (l) the names and addresses of the auditors (if any) of the company ; and

- (*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company; and
- (*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

- (*a*) the purchase money is not fully paid at the date of issue of the prospectus; or
- (*b*) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (*c*) the contract depends for its validity or fulfilment on the result of that issue.

(3) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression “vendor” included the lessor, and the expression “purchase money” included the consideration for the lease, and the expression “sub-purchaser” included a sub-lessee.

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any

requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof ; or

(b) the non-compliance arose from an honest mistake of fact on his part :

Provided that in the event of non-compliance with the requirements contained in paragraph (m) of subsection (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9) Nothing in this section shall limit or diminish any



liability which any person may incur under the general law or this Act apart from this section.

**Section 82.**—(1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

SECOND SCHEDULE.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

STATEMENT IN LIEU OF PROSPECTUS

filed by

LIMITED,

pursuant to section eighty-two of the Companies (Consolidation) Act, 1908.

Presented for filing by

THE COMPANIES (CONSOLIDATION) ACT, 1908.

LIMITED.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company	£	
Divided into . . . . .	Shares of £	each.
	"	"
	"	"



Names, descriptions, and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash.	1. shares of £ fully paid.
The consideration for the intended issue of those shares and debentures.	2. shares upon which £ per share credited as paid.
	3. debenture £
	4. Consideration.
Names and addresses of (a) vendors of property purchased or acquired, or proposed to be (b) purchased or acquired by the company.	
Amount (in cash, shares, or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash . . . . £ Shares . . . . £ Debentures . . . £  Goodwill . . . . £
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or	Amount paid. „ payable.
Rate of the commission . . . .	Rate per cent.
Estimated amount of preliminary expenses	£
Amount paid or intended to be paid to any promoter.	Name of promoter.
Consideration for the payment.	Amount £ Consideration :—

(a) For definition of vendor, see Section 81 (2) of the Companies (Consolidation) Act, 1908.

(b) See Section 81 (3) of the Companies (Consolidation) Act, 1908.

<p>Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).</p>	
<p>Time and place at which the contracts or copies thereof may be inspected.</p>	
<p>Names and addresses of the auditors of the company (if any).</p>	
<p>Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.</p>	
<p>Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.</p>	<p>Nature of the provisions.</p>

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorised in writing.)

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## TEST QUESTIONS

which should be considered by the Student  
after reading each Chapter.

### CHAPTER III.

1. What restrictions are imposed on the choice of a name by a limited company?
2. Can a limited company in any case dispense with the use of the word "limited" as part of its name?
3. How is the domicile of a company (1) fixed and (2) changed?
4. If there is no registered office, how can writs be served?
5. Distinguish between acts which are *ultra vires* the directors and *ultra vires* the company.
6. How can the powers of a company be changed?
7. Give an example of—
  - (1) an illegal object.
  - (2) a main object.
8. What is the effect of a company giving up its main object?
9. Are the powers in the Memorandum strictly construed?
10. In what different ways may the liability of members be limited?
11. Give in outline the contents of a Memorandum of Association.
12. How many persons are necessary to form (1) a public company, (2) a private company?
13. Who are the "signatories of the Memorandum"? What are their duties?

### CHAPTER IV.

1. What is meant by the "regulations" of a company?
2. State some of the matters usually contained in Articles of Association?
3. What is "Table A"?
4. How and with what restrictions can the Articles be altered?

5. To what extent are the Articles binding on—
  - (1) the company?
  - (2) the members?
6. Who is the Registrar of Companies? What matters are entered in his register? Contrast his register with the register kept by the company.
7. State the rule in the *Royal British Bank v. Turquand*.

## CHAPTER V.

1. What is the position of a person who enters into a preliminary contract on behalf of a company not yet formed?
2. What steps must be taken for the purpose of registering—
  - (1) a new company?
  - (2) an existing unregistered company?
3. How far is the certificate of incorporation conclusive evidence?

## CHAPTER VI.

1. What remedies has a person who has been induced to take shares by false statements in a prospectus?
2. What is a prospectus?
3. Enumerate the matters which must be disclosed in a prospectus. Does it make any difference if—
  - (1) it is not issued to the public?
  - (2) it is issued more than a year after the company can commence business?
4. What is the "minimum subscription?"
5. If a company does not issue a prospectus, what provisions apply?

## CHAPTER VII.

1. In what three ways can persons become members of a company?
2. Is it necessary in all cases that a person should be entered on the register before he becomes a member?
3. In what case may a signatory of the Memorandum be excused from taking and paying for the shares for which he has signed?
4. Is the entry on the register conclusive evidence that a person is a member?

5. Can (1) a married woman, (2) a company, (3) an infant, be members of a company?
6. Can a company buy its own shares?
7. How can a person cease to be a member of a company?
8. Describe the liability of a member—
  - (1) while he is a member;
  - (2) after he has ceased to be a member.
9. Under what circumstances can shares be allotted for a consideration other than cash? To what extent is the amount of the consideration material?
10. If the company allots shares in payment of an existing debt, is this an allotment for cash?
11. Who may inspect the register of members? May a member make extracts from the register?
12. Is a person liable as a contributory who has been induced to become a member by fraud?
13. Explain the position of a trustee who is entered on the register as a holder of shares. Is he personally liable for calls?

## CHAPTER VIII.

1. What is an allotment of shares?
2. In a contract to take shares, what constitutes the offer, and what constitutes the acceptance?
3. Can there be a conditional allotment?
4. What provisions must be complied with before any allotment is made?
5. Explain the form, object, and effect of a share certificate.
6. Show what is meant by—
  - (1) estoppel as to title;
  - (2) estoppel as to payment.
7. How, and subject to what restrictions may a member transfer his shares?
8. May directors refuse to register a transferee without assigning any cause?
9. What rules govern the priority between several transferees of the same shares?
10. What is the effect of—
  - (1) a blank transfer?
  - (2) a forged transfer?

11. If a shareholder neglects to notice a letter from the company stating that a transfer of his shares has been presented, is he thereby estopped from disputing the validity of the transfer?
12. What is the effect of an invalid transfer?
13. On the death of a member in whom do his shares vest? Are his executors liable for calls? Is his estate liable? Can the company insist on putting the executors on the register of members?
14. What is a share warrant to bearer? When may it be issued?
15. What is a call? Who can make calls?
16. What is the effect of money being paid up in advance of calls?
17. Show by examples that the power of making calls is in the nature of a trust.
18. When may directors declare shares to be forfeited?
19. May the company sell the forfeited shares?
20. When will equity relieve against such forfeiture?
21. What is the effect of a clause that any member who takes proceedings against the company shall forfeit his shares?
22. When shares have been forfeited, can the company sue the member for past calls?
23. When has a company a lien on shares?
24. Can lien be enforced—
  - (1) by sale?
  - (2) by forfeiture?
25. What rules determine the priority between the company's lien and a mortgage of shares made by a member?
26. Explain the difference in effect of the use of the words "due" and "indebted" in this respect.

## CHAPTER IX.

1. Explain the difference between preference and ordinary shares.
2. What is meant by cumulative preference shares with preference as to capital? If shares are described simply as preference shares what cumulative or preferential rights do they carry?
3. What are founders' shares? What provisions in the Companies Act relate to founders' shares?
4. How can a company create reserve capital? What is the

nature of such capital? Can it be dealt with by the company?

5. How may capital be (1) altered, (2) reduced, (3) increased?
6. What is the effect of turning shares into stock? What kind of shares may be turned into stock?
7. When (if at all) may capital be reduced without the leave of the court?
8. What is meant by an all-round reduction? When is it allowed?

#### CHAPTER X.

1. What are dividends? How are they declared and paid, and in what proportion among the members?
2. Out of what fund may dividends be paid?
3. Explain the difference between circulating capital and fixed capital. To what extent is this distinction of importance?
4. If directors wrongfully pay dividends out of capital, what is the extent of their liability?
5. If a director has been compelled to repay such dividends can he recover any proportion from shareholders?

#### CHAPTER XI.

1. Is it necessary that the Memorandum should give a company express powers of borrowing?
2. How can the borrowing powers be restricted?
3. What circumstances are sufficient to give a company power to charge its uncalled capital?
4. What words are necessary to create such a charge?
5. Explain the effect of a company borrowing beyond its powers. Under what circumstances can the lender (1) recover his money, (2) get a valid charge?
6. What are Lloyd's Bonds?
7. Mention six ways in which a company can borrow money.

#### CHAPTER XII.

1. What are debentures?
2. What is debenture stock?

3. Enumerate the conditions generally indorsed upon a debenture.
4. What is the effect of declaring that an issue of debentures shall rank *pari passu*?
5. Define a floating charge, and explain its effect.
6. Does a floating charge take priority over (1) a subsequent legal mortgage taken (a) with (b) without notice of the debenture? (2) A subsequent equitable mortgage without notice?
7. When does a floating charge crystallise?
8. How is it that debentures are not generally assignable subject to equities?
9. What are the respective advantages of appointing a receiver—
  - (1) under a power in the debenture?
  - (2) by the court?
10. When will a manager be appointed?
11. What is the form of a trust deed to secure debentures?
12. What are the advantages of such a deed?
13. How does a bearer debenture differ in form from a debenture to registered holder?
14. Are bearer debentures negotiable?
15. Specify the provisions of the Companies Act, as to the registration of debentures, and the rights of members to inspect the registers.
16. What is the effect of non-registration?
17. Under what circumstances and with what limitations may the time for registration be extended?
18. How may debentures be transferred?
19. Can shares be issued at a discount?
20. Can debentures be issued at a discount?
21. What is the effect of an undertaking by the company to issue debentures?
22. Does a floating charge have priority over—
  - (1) distress by landlord for rent?
  - (2) payments which have preference in bankruptcy?
  - (3) a garnishee order?
  - (4) judgment creditors?
23. Enumerate the remedies of debenture-holders.
24. Why is it that an order for foreclosure is not often made in a debenture-holder's action?



## CHAPTER XIII.

1. What is underwriting?
2. What is brokerage?
3. Under what circumstances is underwriting allowed?
4. Is it necessary to disclose sub-underwriting contracts in a prospectus?

## CHAPTER XIV.

1. Show that directors are to some extent trustees and to some extent agents of the company. In what respect are they not properly described as trustees?
2. How are first directors appointed?
3. What is the effect of the number of directors falling below the minimum fixed by the Articles?
4. Define a quorum of directors.
5. What provisions are made by the Companies Act, as to the qualification of directors?
6. Can a director sue the company for remuneration—
  - (1) if none is agreed upon?
  - (2) if he has served for part of a year?
  - (3) if there are no profits?
7. What powers are usually given to the directors?
8. If a disqualified director acts as director, what is the result? Can the Articles provide against this?
9. Under what circumstances can a director make contracts with the company?
10. Are directors liable for (1) slight negligence, (2) gross negligence? What relief is given to directors in this respect by the Companies Act?
11. Is a director bound to attend board meetings?
12. If one director is compelled to pay for misfeasance, can he recover contribution from the other directors?

## CHAPTER XV.

1. Distinguish between the three different kinds of meetings of members.
2. What provision is made by the Companies Act for requisitioning a meeting?
3. Can a chairman arbitrarily close a meeting?

4. To what extent is the chairman's entry in the minute book conclusive evidence?
5. How are the votes taken at a meeting?
6. Can proxies be counted on a show of hands?
7. Distinguish between—
  - (1) an ordinary resolution;
  - (2) a special resolution; and
  - (3) an extraordinary resolution.

## CHAPTER XVI.

1. Are directors bound to keep accounts?
2. Is a company bound to have its accounts audited?
3. What are the duties of auditors?
4. Can they be made liable for negligence?

## CHAPTER XVII.

1. Define a private company.
2. How does a private company differ from a public company?
3. What is a syndicate?

## CHAPTER XVIII.

In what respects does a company limited by guarantee differ from a company limited by shares?

## CHAPTER XIX.

1. When may a company be wound up by the court?
2. Is fraud a sufficient ground for winding-up by the court?
3. How may the insolvency of a company be proved?
4. Who may petition for winding-up?
5. Contrast the rights of a contributory to demand winding-up by the court with those of a creditor.
6. Can a fully-paid shareholder petition?
7. How long must a person have been a member of a company to entitle him to petition?
8. What orders may be made by the court on a winding-up petition?

## CHAPTER XX.

1. When and by what means may a company be wound up voluntarily?
2. What is the effect of a voluntary winding-up?
3. Sketch the proceedings in a voluntary winding-up.
4. Show the extent of the liquidator's liability for the debts of the company.
5. How is a liquidator appointed in a voluntary winding-up?
6. How does a company come to an end on a voluntary winding-up?
7. Contrast the rights of contributories and creditors to petition for winding-up by the court after a voluntary winding-up has commenced.

## CHAPTER XXI.

1. What is the effect of an order for winding-up under supervision?
2. Why is the order of less effect now than formerly?

## CHAPTER XXII.

1. Enumerate the powers of a liquidator appointed by the court.
2. Does the property of the company vest in the liquidator?
3. Define the position of a liquidator and discuss his duties.

## CHAPTER XXIII.

1. What is the effect of a winding-up on—
  - (1) proceedings against the company?
  - (2) dispositions by the company of its property?
2. How must a creditor prove his claims against the company?
3. What debts may be proved?
4. What is the effect of not proving within the time specified?
5. How are the costs of proving a debt provided for?
6. What rules of bankruptcy practice apply to the winding-up of companies?
7. Show how the rights of the contributories are adjusted by the liquidator.

8. How does winding-up affect the position of the servants of the company?
9. What persons may be summoned and examined by the court on a winding-up?

#### CHAPTER XXIV.

1. Describe the usual method of reconstruction of a company.
2. Can a contributory be deprived of his right to claim a sale of his shares under section 192?
3. Can the undertaking of a company be sold to a foreign company for the purpose of reconstruction?

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